Feb. 8. 2-618. Judge Dam

Affirmed. Sweyne to write

TRANSCRIPT OF RE[illegible].

SUPREME COURT OF THE UNITED STATES.

No. 866.

EDWIN M. LEWIS, TRUSTEE OF JAY COOKE & CO., BANKRUPTS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED DECEMBER 8, 1875.

2 Brown's Ch 4 — 381

Hankey, 2 Yeates

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1 In the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit.

THE UNITED STATES OF AMERICA
vs.
EDWIN M. LEWIS, TRUSTEE, HUGH MCCULLOCH, J. H. PULESTON, and FRANK H. EVANS. } April sessions, 1875. No. 7. In equity.

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April sessions, 1875, No. 7.

It is thus contained:

2 Be it remembered that, on the sixth day of March, in the year of our Lord one thousand eight hundred and seventy-five, the United States of America, by William McMichael, esquire, come into our said court here and file of record their bill of complaint against Edwin M. Lewis, Hugh McCulloch, J. H. Puleston, and Frank H. Evans, which said bill being read is in the words and figures following, to wit:

3 In the circuit court of the United States for the eastern district of Pennsylvania.

To the honorable the judges of the said court:

The United States of America bring this their bill of complaint against Edwin M. Lewis, of the city of Philadelphia, Hugh McCulloch, J. H. Puleston, and Frank H. Evans.

1. And thereupon your orators show unto your honors that, for a long time anterior to the twenty-fifth day of September, 1873, there was a partnership conducting the business of bankers in the city of London, in the kingdom of Great Britain, under the firm or style of Jay Cooke, McCulloch & Company.

2. The said partnership was composed of Hugh McCulloch, who is a citizen of the State of Indiana, J. H. Puleston, and Frank H. Evans, all of whom were and are residents in the said kingdom of Great Britain, and of Jay Cooke, William G. Moorhead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, junior, who were, during the continuance of said partnership, and on the 22d of September, 1873, and until the said Jay Cooke, William G. Moorhead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, junior, became and were adjudicated bankrupts, residents within the United States.

3. The said firm of Jay Cooke, McCulloch & Company had been for a long time prior to the 22d September, 1873, special agents of the Navy Department of the United States of America to meet and discharge the foreign expenses of the ships of your orators, and they had, while
4 acting as such agents, received from time to time large sums of money on deposit to meet drafts drawn by paymasters or other officers and agents of the United States, under letters of credit or other authority given them by the Navy Department, on the said Jay Cooke, McCulloch & Company.

4. The said Jay Cooke, William G. Moorhead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, junior, were at the same time partners in a banking-house established in the United States, under the firm of Jay Cooke & Company, and they continued to be members of that firm until they were adjudicated bankrupts.

5. On the 25th September, 1873, a petition was filed in the district court of the United States for the eastern district of Pennsylvania, praying that the said Jay Cooke, W. G. Moorhead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., together with James A. Garland, who composed the firm of Jay Cooke & Co., should be adjudicated bankrupts, and on the 26th of November it was so proceeded in the cause that they were adjudicated bankrupts, and that adjudication remains hitherto unreversed and in full force.

6. On the eighteenth day of September, 1873, the balance of the account due your orators by the firm of Jay Cooke, McCulloch & Co., in London, as special agents as above stated, and on the transactions between your orators and that firm as such *such* agents, was £170,055 18*s.* 11*d.* sterling. After that day, and by the close of the 24th day of September, 1873, the said firm had reduced that balance to £161,932 2*s.* 8*d.* sterling, by payments duly made for account of your orators. After that date, and by the close of the 19th day of October, the said firm had still further reduced said balance to the sum of £131,610 9*s.* 8*d.* sterling, by payments for account of you' orators.

7. Since that time there has been nothing paid to or for account
5 of your orators on that balance other than the following sums realized on collateral securities that were pledged to an agent of your orators for the same, so that the account now stands thus: Oct. 20, 1873. Balance due, £131,610 9*s.* 8*d.*

Received January 24, 1874	£8,137	11*s.*	11*d.*
" " 27, "	64	6*s.*	9*d.*
" February 3, "	1,503	9*s.*	0*d.*
Balance due	£121,905	2*s.*	0*d.*

no part of which sum of £121,905 2*s.* sterling has been paid to your orators, nor has the same been in any manner or to any extent reduced, except as above stated.

8. Your orators further aver that Jay Cooke, William G. Moorhead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., or some of them, who were partners in the said firm of Jay Cooke, McCulloch & Co., and were adjudicated bankrupts as above stated, were at the time of the said adjudication possessed of separate or individual estates and property of considerable value over and beyond any specific liens or charges thereon which can lawfully be paid out of the same before the debt due your orators as aforesaid shall have been paid.

9. That under the said proceedings in bankruptcy, and in pursuance of the provisions of the bankrupt act, Edwin M. Lewis, one of the defendants, was appointed a trustee of the estate of the said bankrupts, and as such has received and now holds the said separate or individual estates and assets of the said bankrupts.

10. And your orators aver that, by force and virtue of the act of Congress in such case made and provided, immediately upon the said debtors of your orators becoming and being adjudicated bankrupts, inasmuch as the estates of the said bankrupts are not sufficient to pay all the indebtedness of the said bankrupts, your orators became
6 and are entitled to receive and have payment of the debt so as aforesaid due them by the said bankrupt debtors, out of and from all the estate, property, or assets belonging to them, or any of them, in priority to the application of the same towards the payment of

any other creditor of said debtors other than those who may have a specific lien on the same, if any such there be, of which your orators are ignorant.

11. And your orators aver that, in virtue of that right of priority of payment, your orators are entitled to have an account stated and settled by the said Edwin M. Lewis of the said separate estates of the said bankrupt debtors, and of his administration of the same, and to have the said estates, property, and assets sold or disposed of, and the proceeds applied in payment of the said debt due by the said bankrupt debtors.

12. And your orators aver, that they have, in expectation and hope that said payment would be made, applied in a friendly manner to the said Edwin M. Lewis, and requested that such accounts should be settled and payment made.

13. But the said Edwin M. Lewis at times pretends that there is no right in your orators to have any account or payment; or if your orators have any such right, that it cannot be enforced in any manner, or to any extent, until after your orators have exhausted their remedies against the partnership of Jay Cooke, McCulloch & Co., and their assets. The contrary whereof your orators charge to be the rule of law, and they insist that their right to priority of payment out of the estates of any debtor, in the event of the bankruptcy of said debtor, is a legal one created by statute, and is not conditional upon the performance of any such acts on their part as are insisted on by the said defendant. And that it is unreasonable to import into the statute by construction a duty on the part of the United States to seek to enforce payment from some of their debtors, resident in a distant and foreign
7 country, before they can be permitted to enforce payment from debtors resident here, and more especially when the debtors resident here differ in respect of their obligation to your orators in no respect from the nature of the obligation of the foreign debtors. That the right to compel a creditor to pursue one debtor or one source of satisfaction rather than another, and to interfere with his discretion in the mode of collecting debts due, is, under all circumstances, a mere equitable right, and can never be employed to displace or interfere with a legal right, and especially not with one created and secured by statute, as is the right of your orators.

14. And your orators further aver that if such a duty exists, and must be performed before your orators are permitted to enjoy their statutory right of receiving payment from the debtors' estate, that then your orators have the right to the aid of this court to secure the said funds, property, and estate in the hands of Edwin M. Lewis, received from the individual estates of the bankrupt debtors, so that the same shall be and remain for your orators in the event of their proceedings against the debtors, who are resident abroad, and are not bankrupts, proving wholly or in part faithless.

15. At other times the said Edwin M. Lewis pretends that your orators are not entitled to receive payment out of the proceeds of the private estates of said bankrupt debtors until the private creditors are satisfied—the contrary whereof your orators insist to be their right, and that they are entitled to be paid in preference to any other creditor of the bankrupt debtors out of whatever was the property of the said bankrupts on the day the said petition was filed, inasmuch as the right of the private creditors to be first paid out of said estates arises either under the bankrupt act or by virtue of an equity merely, in order to produce equality among creditors; whereas the right of your orators,

though recognized and retained by the bankrupt act, is not created
8 by it or dependent on its provisions, but arises out of and is created by an earlier statute. And as to the equity intended to produce equality, which arises only where there is an insufficiency of assets to pay all, the statute, by which your orators' rights were created, gives that right of priority of payment in that very case and for that very reason, and was intended to destroy the right of other creditors not merely to equality, but to any participation in the assets until the debts due to your orators were paid in full.

16. At other times the defendant, Edwin M. Lewis, pretends that this court has no jurisdiction to enforce any of the rights claimed by this bill, and that the district court in bankruptcy has exclusive jurisdiction to decide on the rights of your orators to any of the funds in his hands, and upon all questions that may arise on the settlement of his accounts as a trustee in bankruptcy. But your orators aver that they are not bound to proceed to enforce their claim under the provisions of the bankrupt act, but may elect to proceed in the manner they have done, or as an ordinary creditor in bankruptcy, if they see fit so to do. They are not named in the act so as to bind them, as the United States only can be bound in restriction of previously existing rights and powers. On the contrary, their rights as existing prior to the bankrupt act are saved and reserved from modification by said act in the lessening of such rights or restricting the remedies possessed by them; and that it is inconsistent to so construe the bankrupt act as to deprive the United States of the right of appeal from adjudication as respects either the amount due them or the extent of their rights and remedies under the statutes of the United States, as against their debtors or the assets of such debtors.

17. And they further show that by an arrangement among the creditors of the said bankrupts, in which your orators did not participate, and which they could not control, the administration of the said estate and the division of the same among the creditors of the bankrupts
9 is removed from the ordinary jurisdiction of the court in bankruptcy, and invested in a trustee and a committee of creditors, chosen by the creditors themselves. And your orators aver that while such a mode of administration is allowed to the creditors at their option, it was not designed to remove from the United States the right to litigate claims due them, and enforce their rights in the ordinary courts of justice, and compel them to seek redress from persons who are necessarily parties interested to deprive your orators of their statutory rights, or agents of those who are so interested.

18. Inasmuch, therefore, as the estate out of which your orators are entitled to be paid has been lawfully vested in a trustee subject to a duty on his part, to apply the same to the payment of your orators' claims, your orators have no adequate redress, saving in a court of equity, either to ascertain what they are entitled to receive or to compel payment to them.

To the end, therefore, that the defendants may answer the premises, and

19. That the court will be pleased to ascertain and determine the amount which is due to your orators by the said bankrupt debtors, who were partners in the firm of Jay Cooke, McCulloch & Co., until their bankruptcy; and, secondly, to declare and establish the rights of your orators in respect of that debt as respects the private estates of the said bankrupt debtors; and thirdly, to declare that by the act of bankruptcy your orators became entitled to have and receive payment of said debt

and interest out of the proceeds of said private estates of those of the defendants who were liable for the same as partners and are bankrupts; and, fourthly, to declare that your orators are so entitled in priority to the right of any creditor to be paid out of any property that was, in law, the property of their debtors at the time they became bankrupts, and whether such creditor claim as a creditor of the firm of Jay Cooke & Co., or
10 of Jay Cooke, McCulloch & Co., or as a separate creditor of any one of the bankrupt debtors, or as joint creditor of any two or more; and, fifthly, to declare that the said trustee holds the said separate estates and property in trust in the first place to apply the proceeds thereof, after paying the necessary expenses of administering the trust, towards paying your orators their debt and interest and the costs of this suit; and, sixthly, to declare that your orators are entitled to have an account taken under the direction of this court of the assets and property, real and personal, received by the said trustee from the bankrupt debtors, being their separate estates, and of his administration and disposition of the same; and, seventhly, to declare that your orators are entitled to have the said property sold and converted into money with all reasonable diligence, and the proceeds applied aforesaid, and to order and direct such an account to be taken and sale made; and eighthly, should the court see fit to declare that your orators are not entitled to any or all of the particulars of the relief here prayed until they shall have exhausted their remedies against such of the members of the firm of Jay Cooke, McCulloch & Co., as are not bankrupts, and as against such of them as are not within the United States, that then your honors will be pleased to restrain and enjoin the defendant, Edwin M. Lewis, from making any disposition of the proceeds of any of the private estates that may have come or may hereafter come to his hands, until it shall be ascertained whether the result of such proceedings against such of the debtors of your orators as are not bankrupt will enable your orators to obtain satisfaction of their said debt; and, ninthly, and that your orators may have such further and other relief as to your honors shall in the premises seem meet.

May it please your honors to grant unto your orators the writ of injunction as above prayed, and the writ of subpœna directed to the said Edwin M. Lewis, and to the said Hugh McCulloch, J. H. Pulestou, and Frank H. Evans, when they shall come within the jurisdiction of
11 this court, commanding them to be and appear before your honorable court on a day to be therein named, to answer the premises, and to stand to perform and abide such further order and decree as to you honors in the premises shall seem meet, and your orators will ever pray.

WILLIAM McMICHAEL,
Attorney for the United States for the eastern district of Pa.

And thereupon, afterwards, to wit, on the tenth day of April, A. D. 1875, the complainants, by their attorney, file amendment to bill; which being read is as follows:

12 In the circuit court of the United States for the eastern district of Pennsylvania. In equity.

UNITED STATES *vs.* LEWIS. } April session, 1875. No. 7.

The complainants amend their bill by inserting the following averment at the end of the twelfth paragraph of the bill filed by them:

Your orators aver that the defendant Edwin M. Lewis has in his hands money received by him from the private estate of the bankrupts, as follows:

From the estate of		W. G. Moorhead	$184,871 71
"	"	H. C. Fahnestock	46,432 28
"	"	Pitt Cooke	18,275 51
"	"	George C. Thomas	15,274 70
"	"	Jay Cooke, jr	2,990 60
In the aggregate amounting to			$267,844 80

And these amounts are admitted to have been so received by accounts filed by the defendant in the district court in bankruptcy.

Your orators, not intending to be concluded by the said accounts or to admit their correctness, are advised that they are entitled to be paid the said sums of money as being moneys in the hands of the defendant as a trustee which is applicable in the first instance to the debt due to your orators.

Also, by inserting at the end of the fifth clause of the prayer for relief, the following additional prayer for relief: That the defendants shall forthwith pay to your orators all sums of money now in hands arising from the separate estates of the bankrupts, as stated in the twelfth paragraph of this bill as now amended.

13 And thereupon, afterwards, to wit, on the twenty-first day of April, A. D. 1875, Edwin M. Lewis, one of the respondents, by his counsel, R. L. Ashhurst, esquire, comes into court here and files of record his answer to complainant's bill of complaint, and also his cross-bill; which said answer and cross-bill being read, are in the words and figures following, to wit:

14 In the circuit court of the United States for the eastern district of Pennsylvania.

BETWEEN THE UNITED STATES OF AMERICA, plaintiffs,
and
EDWIN M. LEWIS, HUGH MCCULLOCH, J. H. Puleston, and Frank H. Evans, defendants.

The separate answer of Edwin M. Lewis, one of the said defendants.

The said Edwin M. Lewis, not waiving or releasing any exception or objection as to various errors and imperfections in said bill, nevertheless, by way of answer thereto, saith as follows:

I. This respondent admits the truth of the matter set forth in paragraphs one to nine of said bill for the purpose of the present proceedings.

II. This respondent saith that the said Hugh McCulloch, J. H. Puleston, and Frank H. Evans have continued, from the time in the said bill mentioned until the present date, to transact the business of bankers, in London, England, and have never, to the best of this re-

15 spondent's information and belief, been declared or adjudicated to be bankrupt or insolvent in any manner or form.

III. This respondent is further informed and believes that there are assets of the said firm of Jay Cooke, McCulloch & Co. in the possession

and control of the said Hugh McCulloch, J. H. Puleston, and Frank H. Evans to a large amount, both in this country and in England, the exact amount of which this respondent is not able to specify.

IV. This respondent is informed and believes, and on such information and belief avers, that said Hugh McCulloch, one of said defendants, has individual and separate property and estate of considerable value within the United States, the exact amount whereof he is unable to specify.

V. This respondent further saith that he is informed and believes, and on such information avers, that after the contracting of the debt aforesaid, for the recovery of which the bill in this suit appears to be brought, the said Hugh McCulloch, J. H. Puleston, and Frank H. Evans, being then in possession of the firm-assets of Jay Cooke, McCulloch & Co., from and after the 18th of September, 1873, the day of the failure of Jay Cooke & Co., and which included the partners other than said McCulloch, Puleston, and Evans, of said Jay Cooke, McCulloch & Co., transferred, assigned, and set over, on some date not precisely known to the respondent, but subsequent to said 18th of September, and as to a large portion thereof subsequent to the filing of said petition in bankruptcy on the 25th of September, to the plaintiffs, a very large amount of assets, property, and securities of the said firm of Jay Cooke, McCulloch & Co., consisting of iron, or warehouse receipts therefor, railroad bonds, and certain claims of said Jay Cooke, McCulloch & Co. against said Jay Cooke & Co., the exact amount of which this respondent is not able at this time to specify, as collateral security for said claim due the plaintiffs, which said property, assets, and securities were within the United States when so transferred.

16 VI. The said plaintiffs claim, as this respondent is informed, that they have the right to apply said collaterals to a certain other debt alleged to be due the plaintiffs by said Hugh McCulloch, J. H. Puleston, and Frank H. Evans, subsequent to the filing of said petition in bankruptcy, on the twenty-fifth day of September, 1873. Of the nature and amount of said debt this respondent is not acquainted of his own knowledge, but he cannot admit that said collaterals are so applicable.

VII. And this respondent further saith that the said Jay Cooke, William G. Moorhead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., were, as complainants have, in fact, conceded in the fourth paragraph of their bill, partners in a banking firm in the United States, with one James A. Garland, under the partnership name of Jay Cooke & Co., and said partnership and the partners therein were, on the 26th of November, 1873, on petition filed September 25th, 1873, adjudicated bankrupts, and subsequently your petitioner, appointed and duly confirmed as trustee to take, hold, and distribute the estate late of said bankrupts, under the provisions of the forty-third section of the "Act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, under the direction of a committee of creditors, also duly chosen and confirmed, consisting of John Clayton, Isaac Norris, Robert Shoemaker, Charles P. Helfenstein, and Joseph Brown, and claims to an amount of upwards of nine million dollars have been proved against the said estate.

VIII. And this respondent further saith that, on the first day of December, 1874, he submitted his report and account of said estate to the said John Clayton, Isaac Norris, Robert Shoemaker, Charles P. Helfenstein, and Joseph Brown, the committee of creditors aforesaid, who duly proceeded to audit the same, and on the fourth day of January, 1875

the said committee having duly audited and examined said account, confirmed the same, and having duly made up their report of said audit, filed the same in the district court of the United States
17 for the eastern district of Pennsylvania, appending thereto the said account and report of this respondent. This respondent admits that said account shows the balances in hand due to the separate estate of the said bankrupt partners of Jay Cooke, McCulloch & Co., mentioned in said bill, and that he has in hand the sums therein mentioned, belonging to said estates, according to his marshalling, approved and confirmed by said committee; but he saith further that against the estate of William G. Moorhead separate debts have been provisionally proved large enough to absorb said balance.

IX. This respondent further saith, that he is advised and believes that the said bill cannot be maintained against him in manner and form as the same is filed, for the following reasons:

1. Because it is nowhere in said bill alleged that there is any legal or declared insolvency of said Jay Cooke, McCulloch & Co., the firm directly the debtor of the plaintiffs, as alleged in said bill, nor in fact any allegation that said firm is in fact insolvent, while such legal and declared insolvency is necessary to base the right of the plaintiffs to make claim in this proceeding.

2. Because there is in said bill no allegation of a demand of or from Jay Cooke, McCulloch & Co., or the partners in that firm not bankrupt, of the debt for which this bill is brought, nor of the refusal or inability on their part to pay the same if so demanded.

3. Because there is no allegation in said bill of any liquidation or ascertainment of the firm affairs of said Jay Cooke, McCulloch & Co., and of the amounts found respectively due or owing by said firm or the respective partners, or by the said partners to the firm.

4. Because there is no allegation in said bill that there are no firm-assets of said Jay Cooke, McCulloch & Co., nor that the
18 firm-assets of Jay Cooke, McCulloch & Co. are not adequate to pay the debts of that firm.

5. Because, this being a proceeding in equity, complainants, to seek equity, must do equity, and, contrary to the pretension set up in their bill, comply with the equitable rule that the private estates should be first appropriated to the private creditors and the partnership estate to the partnership creditors, so that the estates of said bankrupt partners of Jay Cooke, McCulloch & Co., in the hands of this respondent, as trustee in bankruptcy, must be primarily applicable to their private debts, and only as to a surplus to firm debts.

6. Because it appears and is admitted by the said bill that the said bankrupt partners of Jay Cooke, McCulloch & Co. were also members of the bankrupt firm of Jay Cooke & Co., and, therefore, under the rules of equity the surpluses of their individual estates can only be applied proportionately between the creditors of the two firms of which they were members, ratably to the respective amounts of the debts of each firm and the priority, if any, of the plaintiffs, and, therefore, can only apply in the order of the fund out of which, if it were an ordinary debt, it would be entitled to share, so that, as the individual creditor of Jay Cooke, McCulloch & Co. could only claim a dividend out of the proportionate share of the surplus of the individual estate coming to the creditors of that firm, it is only as to that fund that the plaintiffs can claim priority.

7. Because the United States, inasmuch as its claim to priority must be based upon the fact of bankruptcy or insolvency, if the fact of the

bankruptcy of said individual partners in the firm of Jay Cooke & Co. is relied on, must submit itself to the rules and principles of bankrupt distribution as to what fund its debt is payable from and in what order, and cannot claim against the trust on the existence of which its right to proceed must be based.

19 8. Because, there being no declared insolvency of Jay Cooke, McCulloch & Co., as aforesaid, the direct debtor of the United States, there is no right shown in the plaintiffs to proceed at all, unless the mere filing of this bill can be treated as such declaration of insolvency, and therefore, being posterior to the bankruptcy of the individual partners in Jay Cooke & Co., the plaintiffs cannot claim priority over creditors whose interests in *in* said estate are already vested by reason of the bankruptcy of that firm.

9. Because the bill does not allege that the plaintiffs have proved their claims as provided for in the "Act to establish a uniform system of bankruptcy throughout the United States," and such proof is necessary to give the United States as well as any other creditor any status or position to call the trustee into court to answer as to his trust; and this court has no jurisdiction to take or receive such proof, and no original jurisdiction to intervene or control the administration of the estate under the bankrupt law in matters pertaining to distribution.

10. Because it is nowhere in said bill shown or alleged that the complaints are remediless at law and need the assistance of a court of equity, nor that the legal assets of Jay Cooke, McCulloch & Co. are exhausted.

And the said respondent prays that he may have the same benefit of the matters set forth in this paragraph, as if he had raised the same specifically by demurrer.

X. This respondent further saith that the said collaterals, which he is informed and believes are in the hands of complainants, as aforesaid, should be first applied to the liquidation of complainants' debt before the claim is made by them on the private estates of these partners; but if the court should be of opinion otherwise, that at least this respondent is entitled to subrogation to the benefit of said collaterals, and further to subrogation against the firm-assets of said Jay Cooke, McCulloch & Co. and the private assets of said Hugh McCul-

20 loch, J. H. Puleston, and Frank H. Evans, and he prays that in any decree to be made in this proceeding this respondent's rights and equities in this respect may be protected as to right and justice shall belong.

And inasmuch as his rights in this respect may need the active intervention of this honorable court for their protection, he hath filed herewith this cross-bill to the bill filed in this case by the complainants against the said respondent, and the said Hugh McCulloch, J. H. Puleston, and Frank H. Evans, made codefendants with him in this proceeding, to which cross-bill he begs leave to refer as constituting a portion of his defense in this proceeding.

And he prays that he may be hence dismissed with his reasonable costs in this behalf sustained.

R. L. ASHHURST,
J. C. BULLITT,
W. P. CLOUGH,
For Respondent.

In the circuit court of the United States for the eastern district of Pennsylvania. In equity. April sessions, 1875. No.

To the honorable the judges of said court:

Edwin M. Lewis, of the city of Philadelphia and State of Pennsylvania, brings this his cross-bill and complaint against the United States of America, Hugh McCulloch, a citizen of Indiana, and J. H. Puleston and Frank H. Evans, subjects of the kingdom of Great Britain.

I. And thereupon your orator shows to your honors that the said the United States of America have filed in this court an original bill
21 against your orator and the said Hugh McCulloch, J. H. Puleston, and Frank H. Evans, setting forth that Jay Cooke, William G. Moorhead, Harris C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., of whose estate in bankruptcy your orator is, as hereafter set forth, trustee, carried on business with Hugh McCulloch, J. H. Puleston, and Frank H. Evans, as Jay Cooke, McCulloch & Co., in London, and as such were, on the eighteenth day of September, 1873, indebted to the United States of America in the sum of £170,055 18*s.* 11*d.* sterling, reduced subsequently to £121,905 2*s.* sterling. That this respondent, as trustee in bankruptcy of the said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., had in his hands their separate and individual assets, and averring that the said United States of America were entitled to the payment in full of the said debt claimed to be due them by the said Jay Cooke, McCulloch & Co., out of the private or individual estates of said bankrupt partners in his hands, prior to the payment of any other creditors from said funds, praying for relief based on such allegations of priority, all of which will, by reference to said original bill, as the same remains of record in this cause, more fully and at large appear.

II. Your orator saith that he hath filed, contemporaneously with the filing of this his cross-bill, his answer to the said bill of the United States of America, setting forth the grounds of law and fact on which their said claim, as set forth in said bill, should be disallowed and not suffered to be maintained against your orator; that inasmuch as from the nature of the case it may be doubted whether he can make complete defense, and avail himself of all the equities in the case, or whether a complete decree can be made so as to protect the rights and equities of all parties without a cross-bill, or bill in the nature thereof, he files contemporaneously with said answer this his cross-bill, to constitute with said answer his complete answer to said proceeding.

III. Your orator shows that prior to September 18th, 1873, the
22 said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., were copartners in two distinct firms—Jay Cooke & Co. and Jay Cooke, McCulloch & Co.; and in the firm of Jay Cooke & Co. one James A. Garland was united with them, and in said firm of J. Cooke, McCulloch & Co., the said codefendants in this cross-bill, Hugh McCulloch, J. H. Puleston, and Frank H. Evans, were united with them.

The said Jay Cooke & Co. failed and closed their doors the 18th of September, 1873, and on the 25th of that month a petition in bankruptcy was filed against said firm and the individual partners therein, and on the 26th of November, 1873, they were adjudicated bankrupts in the district court of the United States for the eastern district of Pennsylvania, and such proceedings had thereon that afterwards your orator was duly elected and confirmed the trustee of the estate of said

partnership firm of Jay Cooke & Co., and of the said individual partners therein, and said estates were duly vested in him as such trustee, under the provisions of the forty-third section of the "act to establish a uniform system of bankruptcy throughout the United States."

IV. Said Jay Cooke, McCulloch & Co. did not fail or suspend business contemporaneously with said Jay Cooke & Co., nor, to the best of your orator's information and belief, have they ever as a firm failed or been declared insolvent; but the said defendants, Hugh McCulloch, J. H. Puleston, and Frank H. Evans, partners in said firm, not in the firm of Jay Cooke & Co., have continued to manage and have control of its affairs and assets up to the present time.

V. Your orator further shows that he is informed and believes, and on such information and belief avers, that subsequent to the failure of said Jay Cooke & Co., and as to a part thereof, also subsequent to the filing of said petition in bankruptcy against said firm of Jay Cooke & Co. and the individual partners of said firm, and some time between the 25th of September and the 26th of November, 1873, the said
23 Hugh McCulloch, J. H. Puleston, and Frank H. Evans, being then and there in possession and control of the firm assets of the late firm of Jay Cooke, McCulloch & Co., deposited with, delivered, and transferred to the United States of America, through their agents or officers, or some of them, a very large amount of the assets and property late of said firm of Jay Cooke, McCulloch & Co., consisting of railroad-iron, or warehouse receipts therefor, railroad bonds and stocks, and certain claims of a very large amount made by said firm of Jay Cooke, McCulloch & Co. against said firm of Jay Cooke & Co., on which proof has been subsequently made in said district court. These securities and assets your orator is not able accurately to specify, but included among them are the following: Seventeen thousand five hundred and fifty-five tons of railroad-iron; $416,000 bonds of the Indiana and Illinois Central Railroad Company; $145,000 bonds of the St. Joseph and Denver Railroad Company; and claims by said Jay Cooke, McCulloch & Co. against said Jay Cooke & Co., proved in the district court, to the amount of $1,577,751.51, which amount, however, your orator hopes and expects to reduce; all this property and these securities being, as your orator is informed and believes, and therefore avers, within the United States at the time of such transfer.

VI. Your orator is informed and believes that the said the United States of America claim to apply these securities, assets, and property so deposited with or transferred to them by said Hugh McCulloch, J. H. Puleston, and Frank H. Evans primarily to a certain other debt alleged to have been contracted to the United States of America, of the amount of which your orator has no personal knowledge, subsequent to the said 25th of September, the date of the filing of said petition in bankruptcy against said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., by said Hugh McCulloch, J. H. Puleston, and Frank Evans.

24 VII. Your orator charges that this claim and pretension cannot be maintained, but that the said property, assets, and securities, belonging, as they did, to the firm-estate of Jay Cooke, McCulloch & Co., were primarily applicable, not to the said debt contracted after the dissolution of said firm of Jay Cooke, McCulloch & Co., by the bankruptcy of seven of its partners, but to the debt due by said firm to the United States of America prior to said dissolution.

VIII. Your orator further charges, whether this be the case or not, that he is, as trustee of the estates of said bankrupt partners of Jay

Cooke, McCulloch & Co., entitled as to any amounts that may be recovered by the said the United States of America out of the private estates of said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., to subrogation and indemnification out of and from the firm-assets of Jay Cooke, McCulloch & Co. and the private estates of said Hugh McCulloch, J. H. Puleston, and Frank H. Evans.

IX. Wherefore your orator prays that, in the event of any decree in the original bill in this cause in favor of the United States of America against the said private estates of said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., in your orator's hands—

1. That your honors will decree that the said securities and assets late of said Jay Cooke, McCulloch & Co. in the hands of the plaintiffs be duly accounted for, and that on collection of said claim of the United States against said Jay Cooke, McCulloch & Co. for £121,905 2*s.* sterling, a decree be made for the transfer and delivery to your orator, as such trustee, of the said securities, assets, and property, and any proceeds thereof.

2. That your honors will decree that your orator is entitled to subrogation as to any amount paid out of said individual estates to the
25 United States of America against the firm-assets of said Jay Cooke, McCulloch & Co., and the individual estates of said Hugh McCulloch, J. H. Puleston, and Frank H. Evans.

3. That your honors will decree that the said Hugh McCulloch, J. H. Puleston, and Frank H. Evans account to and with your orator for the assets of said Jay Cooke, McCulloch & Co., and they be further decreed to repay your orator out of said assets of Jay Cooke, McCulloch & Co., or ratably from their individual property, any amounts which your orator may as trustee of the said individual estates of said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., be compelled to pay.

And your orator will ever pray, &c.

R. L. ASHHURST,
J. C. BULLITT,
W. P. CLOUGH,
Of Counsel for Complainant in Cross-bill.

26 And thereupon, afterwards, to wit, on the 23d day of April, 1875, the defendants in cross-bill, by their counsel, present and file answer to cross-bill; which being read, is as follows:

The answer of the United States of America, by William McMichael, attorney of the United States of America for the eastern district of Pennsylvania, to the cross-bill filed by Edwin M. Lewis.

These defendants, saving all right of exception to the bill, for answer say they insist upon their right, as creditors of the bankrupt members of the firm of Jay Cooke, McCulloch & Co., to a priority of payment out of the assets which are in the hands of the defendant as the trustee in bankruptcy of the said debtor-partners, as by their bill is claimed.

They deny that the possession of securities for the debt in any manner varies their statutory right to such priority of payment, or that they can be compelled or required to proceed against or realize upon such securities before they shall be admitted to have the benefit of the right secured to them by the statute.

They admit that when said debt is paid, and when all other debts are

paid to pay which they are entitled to apply the securities in their possession, they will be bound to surrender the securities that remain, or the proceeds if sold, to the persons entitled to the same, and they submit to make such a disposition of said assets, when payment of the debts due them have been made, as the court shall direct.

And as respects the said securities and the claim of the complainant to be subrogated to the same, after paying the debt due these defendants out of the private estates of the bankrupt partners, these defendants say that on the 20th of September, 1873, and before the petition in bankruptcy was filed, there being then a large amount due by Jay Cooke, McCulloch & Co., in London, to these defendants, to secure that indebtedness and any balance that might become due upon the continuation of the business, certain securities were assigned to these defendants or to an agent or trustee for them, viz:

27 1. The balance of account due by Jay Cooke & Co. to Jay Cooke, McCulloch & Co., which was not then ascertained, but has since been settled and proved in bankruptcy.

This claim upon two of the items thus proved amounts to $1,577,751.51.

The defendants also insist that another claim against the said Jay Cooke & Co. was also assigned to them for the same purpose, to wit, the claim of the syndicate, which is a partnership in which Jay Cooke, McCulloch & Co. and Jay Cooke were partners, together with several other banking-houses in the United States and Europe; and that by this transfer the defendants have the rights of Jay Cooke, McCulloch & Co. arising out of that transaction.

The debt due the syndicate by Jay Cooke & Co. is admitted to be $109,222.37, and is claimed to be $255,498.53. The amount due out of this to Jay Cooke, McCulloch & Co. is dependent on the settlement of the accounts of the syndicate among themselves.

	T.	c.	qr.	lb.	
2.	5,554	8	2	15	tons of railroad iron in store at New Orleans.
	1,069	12	2	24	tons of railroad iron in store at Du Luth.
	577	19	3	8	tons of railroad iron in store at Buffalo.

These rails were deposited with these defendants by Hugh McCulloch, by delivering to an agent for these defendants warehouse-receipts for said iron, which, as these defendants then believed and aver, passed the legal title and possession of the property to the defendants.

The title to the rails at Du Luth and Buffalo are, however, claimed by third persons, and the same are now in litigation in the supreme court of New York, and all power to deal with them suspended by an injunction issued from that court.

3. Bonds of the St. Jo and Denver Railroad Company of the par value of $145,000.

Bonds of the Boston, Clinton and Fitchburg Railroad Company of the par value $10,000.

28 Promissory notes of the Indiana and Illinois Central Railroad Company for $289,805.79 gold, secured by bonds of that company of the par value of $416,000, the title of which or to the property described therein passed by delivery.

These bonds and the warehouse receipts for the iron are negotiable instruments, and they were delivered to these defendants without notice or knowledge as to the title or claim of title to the same on the part of any person or persons.

There has been realized upon these the following sums:

On the Buffalo bonds, January, 1874	£8,137.11.11
On the Fitchburg coupons, January, 1874	64.06.09
On the Fitchburg bonds, February, 1874	1,503.09.00
	£9,705.07.08

Whether these defendants are or are not bound to carry this sum to the credit of the debt then existing and due to them by Jay Cooke, McCulloch & Co., or whether they are entitled to apply the same to liquidate the debt subsequently contracted, these defendants submit to the court.

They are advised that they are entitled to credit the same to the later debt, as against the complainant or any one claiming under the bankrupts, by reason of the state of the account between such bankrupts and the solvent partners of Jay Cooke, McCulloch & Co., as hereinafter set forth, and, also, because these defendants, when they received the property and when they made the arrangements under which the new debt was contracted, had no notice or knowledge of the interest in or ownership of the property they received, other than what arises from the fact that the property was handed over to them by Mr. McCulloch, one of the partners in the firm of Jay Cooke, McCulloch & Co.

On the 22nd of October, or shortly before that time, and prior to the adjudication of the partners in the firm of Jay Cooke, McCulloch
29 & Co., as bankrupts, and while the business between the defendants and the firm in London was being carried on, and it was deemed necessary by these defendants to make a large deposit with Jay Cooke, McCulloch & Co., in London, to meet drafts that were coming from the various agents of defendants scattered over the globe, under authorities long before given them to draw bills on Jay Cooke, McCulloch & Co., these defendants obtained from Jay Cooke, McCulloch & Co., in consideration of such deposit, the certain securities, viz: 10,085 tons railroad iron. Warehouse receipts for these rails were delivered to these defendants. These documents are negotiable, and these defendants had no notice or knowledge of any title or claim on the same by any person or persons other than what is by inference of law derived from the fact that Hugh McCulloch, acting for the firm of Jay Cooke, McCulloch & Co., delivered said warehouse receipts to the defendants.

These defendants have since learned, and aver that in fact these rails were purchased by Jay Cooke, McCulloch & Co., in order to convert their claim from that of a mere lien to secure advances, into ownership of the iron, and the price thus paid reduced the debt due them from Jay Cooke & Co., by the exact sum thus paid for the iron. But there was no notice or knowledge of the ownership on the part of the defendants at the time they received the same.

These rails consisted of two parcels:

	T.	C.	qr.	lb.	
One of	5,621	7	2	9	tons rails in New York.
And one of	4,466	4	0	1	tons rails in New York.

The parcel last stated is now claimed by strangers, and there is a pending litigation respecting the same, and all dealings with these rails are stopped by an injunction issued by the supreme court of the State of New York.

The defendants also received at the same time and in the same manner, warehouse receipts for 4,887 t., 12 c., 0 qr., 7 lb. *tons* of old

rails, and a claim by Jay Cooke, McCulloch & Co., on the estate of the Woods, who were debtors to that firm, and the right to any sur-
30 plus which might exist in a lot of rails that were held by the Guaranty & Indemnity Company upon pledge. This last was valueless.

It being ascertained that some third persons were interested in 2,094 *t.* 4 3 5 lbs., and the defendants consented to surrender these rails and the claim on the Woods estate to Hugh McCulloch, on receiving from him an undertaking to secure to them on his private estate in America to an amount which is fully equal to the value of the rails thus surrendered.

At the same time the property deposited on the 20th September, 1873, and the claim on the firm of Jay Cooke & Co., who were not then adjudicated bankrupts, was also pledged as security for this indebtedness.

As respects the 4,800 tons of rails, the defendants had no knowledge or notice of the ownership of or interest in the same, and they received them as they had done all other warehouse receipts, under the belief that they became purchasers for value thereof to the extent of the debt that might become due to them, inasmuch as the debt was contracted on the faith of such pledge.

On the six of November, 1873, to secure the further sum of £40,000 intended to be applied to meet certain specific drafts on Jay Cooke, McCulloch & Co., by agents of the defendants, there was deposited with defendants bills receivable, on which there has been realized by defendants £41,278. 6. 0, the surplus, if any, to stand as security for the prior transactions.

After applying £40,000 of this money to meet the advances of that sum, these defendants have realized on the securities deposited October 22, and November 6, at various times from November 14, 1873, to March 7, 1874, £17,878. 17. 3.

Whether the defendants are bound to apply said receipts to the payment of the debt due by Jay Cooke, McCulloch & Co., prior to the 20th September, or whether the defendants can lawfully apply the same to the debt contracted since that time by that firm, these defendants submit to the court, under the circumstances hereinbefore and hereinafter stated.

These are all the securities they have received, and this is the result of the dealings with the same to the present time.

31 The amount due to these defendants upon the balance of their account with Jay Cooke, McCulloch & Co., as it existed on the 20th September, 1873, and deducting all payments by that firm, independent of the receipts from the collaterals as above stated, is therefore £131,610 9*s.* 8*d.* sterling.

If these defendants can be compelled by complainant, to give credit on that account for the proceeds of the collaterals received on the 20th September, 1873, this will be reduced to *to* £121,905 2*s.* 0*d.*, by the amount of said proceeds, to wit, £9,705 7*s.* 8*d.*

But these defendants insist for the reasons stated in this answer, that the complainant cannot compel this application of either of these sums to the reduction of the balance due them by Jay Cooke, McCulloch & Co., unless the use of these sums to pay the subsequently-contracted debt of that firm to defendants is inequitable as against the complainant.

The value of the securities received by defendants as above stated is very uncertain, and in case of those having nominal values, such as bonds, very far below those nominal values. The value of the iron

depends on various circumstances, and it is a matter of judgment when it is prudent to sell the same. For reasons already stated, it is entirely uncertain when these defendants can, if they desire to do so, sell large portions of the iron, as courts having control of the persons of the agents of defendants have prohibited them from parting with the same.

These facts are insisted upon as showing how inequitable is the relief sought by the cross-bill to prevent the defendants using their legal right against the private estates of their bankrupt debtors, until they shall have exhausted their remedies against these securities, for in that case the defendants are compelled either to postpone the exercise of their statutory right upon the estates of their debtors for an indefinite time, viz, till the termination of the litigation as to their right to
32 portions of the iron, or to sell a disputed title as to part, and contrary to their judgment as to other parts of the property pledged.

These defendants therefore insist, as they are advised, that the complainant claiming in right of those of the partners of Jay Cooke, McCulloch & Co., who have been adjudicated bankrupts, have no claim on the assets of that firm under any circumstances, (and apart from all question as to these defendants' rights as purchasers without notice of value,) except such as those bankrupt partners would have as against the solvent partners, who were in possession of said assets, had there been no adjudication of bankruptcy, but a dissolution by death or agreement at the time the dissolution of the firm of Jay Cooke, McCulloch & Co. was affected by the adjudication.

The complainant therefore cannot compel these defendants, holding these assets as a security for the debt due on the 20th September, 1873, by that firm, to do anything with those securities as a condition precedent to these defendants availing themselves of their legal rights secured by the statute against the private estates of the bankrupt partners, nor can he compel these defendants to surrender or sell these securities, and apply the proceeds, nor to account for the securities or their proceeds until the debt due the defendants is first paid.

The defendants insists that when that debt is paid the complainants' right to the assets will depend on the state of the accounts between the bankrupt partners and the solvent partners, inasmuch as these last have the right to retain all assets in their hands in payment of such balances as may be due them by such bankrupt partners.

And the solvent partners have the right to bring into this account and take credit in extinguishment of all balances resulting from the sale of the firm's assets, for the balance that is due by the bankrupt partners, as partners in the firm of Jay Cooke & Co., to the solvent partners of Jay Cooke, McCulloch & Co.

And these defendants having the consent of such solvent part-
33 ners, have the right to retain so much money as will be derived from the sale of said securities, in settlement of any debt due the defendants by the solvent partners, as the solvent partners would have the right to retain against the bankrupt partners.

And inasmuch as by the cross-bill it is admitted that there is a debt of $1,500,000 and upwards, thus due by the bankrupt to the solvent partners, and the complainant does not pretend that there is any item which in such accounting will extinguish that, whether from the sale of the collaterals or otherwise, the complainant has failed to state such a case as raises even a prima-facie right to subrogation on the part of the complainant, and the defendants insist on this as if they had demurred on that ground to the cross-bill.

The defendants further insist that, as the London firm was not dissolved until there was an adjudication in bankruptcy, which was made upon the 26th of November, 1873, the defendants have the right as purchasers of all the securities which they hold to the extent of all balances due them by the firm of Jay Cooke, McCulloch & Co., under any contracts made by that firm prior to November 26, 1873, to the extent of the interest of the solvent members of that firm, as against the bankrupt partners upon the final settlement of all accounts between them, including a settlement for any balance that may be due upon bringing into the account the balance due by the firm of Jay Cooke & Co., of which firm said bankrupt partners were members, and as such debtors to the firm of Jay Cooke, McCulloch & Co.

And they further insist that, apart from this consideration, the solvent partners of Jay Cooke, McCullough & Co. had the right to use the assets of that firm as against their bankrupt partners in their own business, so long as the value of said assets were not sufficient to extinguish the liability to them of their bankrupt partners, on the ultimate settlement of the accounts between them.

And that inasmuch as those solvent partners had certainly the
34 right to sell these securities as being assets of their firm, and retain the proceeds in satisfaction, first, of all balances due them by the firm, and, secondly, in liquidation, by way of set-off, of all debts due them by bankrupt partners on any other account, the solvent partners still retain that right as to the proceeds of such assets, and therefore to consent that their creditors may retain the same, so long as and to such an extent as that the bankrupt partners' rights to such securities are more than absorbed in value by the balances due by them to the solvent partners.

And these defendants aver upon information and belief that upon such final settlement and when the said collaterals are all realized upon and brought into the account, there will be found that nothing is due the bankrupt partners or their estates by the solvent partners, but, on the contrary, that there will still be a large balance due by them to their solvent partners.

Inasmuch, therefore, as the rights of the complainants to the application of the assets of Jay Cook, McCulloch & Co. is merely to the balance that may be due to such bankrupts when all balances due by them to the solvent partners are paid, and it is not pretended that such balances are, or will, or can be paid by any use or application of the collaterals, these defendants insist that the complainant has shown and stated no ground on which he can require these defendants to surrender the securities they hold, by consent of the solvent partners, unless he shall first pay to these defendants all sums due them by the solvent partners of Jay Cooke, McCulloch & Co., and shall then discharge all balances due by the bankrupt partners to the solvent partners.

And they further insist that no other larger or different equity will arise by reason of the payment to the defendants of any money arising from the separate estates of the bankrupt partners than would have arisen, if on the day of the petition filed the said bankrupt partners had
paid into Jay Cooke, McCulloch & Co., to the credit of their separate
35 accounts, the amounts which may hereafter be paid to these defendants out of the said private estates.

And they insist that they have the right to use their legal security and statutory right upon the private estates as they seek to do by their bill, and retain their hold upon the securities in their hands for any debt contracted to them by the firm of Jay Cooke, McCulloch & Co., or by

any solvent members of that firm, by virtue of the legal right of their debtors to such securities for balances due to them and the legal or equitable right of the defendants as creditors of such debtors under a pledge by them of such securities as hereinbefore stated.

And this defendant further saith that he claims such rights and interests in the said property and effects for and on behalf of the United States as this honorable court shall be of opinion that the United States are justly entitled to, without this, that any matter or thing in the bill not herein and hereby traversed or avoided is true, &c.

36 And thereupon, afterwards, to wit, on the 23rd day of April, 1875, the complainant in cross-bill, by his counsel, present and file replication to answer to cross-bill; which being read, is as follows:

Circuit court of the United States, E. D. Pa. April sess.

EDWIN M. LEWIS
vs.
THE UNITED STATES ET AL. } Cross bill to

And now saving and reserving all and all manner of exception to the answer of the United States to the cross-bill of said complainant, he joins issue as to the matters of fact set forth in said answer.

R. L. ASHHURST,
W. P. CLOUGH,
JOHN C. BULLITT,
Of Counsel for Complainant in Cross-bill.

APRIL 23, 1875.

37 And thereupon, afterwards, to wit, on the twenty-third day of April, A. D. 1875, Charles A. DeGraff, William Crooks, and Nicholas DeGraff, co-partners, under the firm-name of DeGraff & Co., by their counsel, W. P. Clough, esquire, come into court here and file, by leave of court, their petition to be made parties defendants; which said petition being read, is as follows, to wit:

In the circuit court of the United States for the eastern district of Pennsylvania.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
EDWIN M. LEWIS, TRUSTEE, AND OTHERS,
Defendants.

38 To the honorable the judges of the said court:

The petition of Charles A. DeGraff, William Crooks, and Nicholas DeGraff, citizens of the State of Minnesota, respectfully showeth:

That your petitioners for four years and more last past have been co-partners in the business of railway construction, under the firm-name of DeGraff & Co.

That the said suit has been commenced and is being prosecuted in this court for the purposes set forth in the bill of complaint therein, a copy whereof is hereunto annexed, to which reference is had for greater certainty.

39 That at the time of the filing of the petition in bankruptcy against the bankrupts, in the said bill set forth, one of the bank-

rupts therein named, William G. Moorhead, was justly indebted to your petitioners, as partners aforesaid, upon contract, in the sum of more than five hundred thousand dollars, no part of which has ever been paid, which debt, in pursuance of an order of the court wherein the said bankruptcy proceedings are pending, has been by your petitioners provisionally proven as a demand against the separate estate of the said William G. Moorhead in the hands of the trustee in bankruptcy, by a depo-
40 sition of proof in due form of law, made by your petitioners and delivered to the said trustee some time in the month of October, A. D. 1873, and long before the filing of the plaintiff's bill.

That at the time of the filing of the petition in bankruptcy against the said bankrupts, the said William G. Morehead was the owner in his individual right of a large amount of property, all of which has passed to the said trustee in bankruptcy, but the same will not, as your petitioners are advised, probably produce a larger amount of money than will be necessary for the payment of your petitioners' demand.

41 That, to the best of your petitioners' belief, no other debts beside that of your petitioners have been proven against the separate estate of the said Morehead, and that your petitioners are advised that they are proper and necessary parties to the said suit.

Wherefore your petitioners pray that your honors will direct the joinder of your petitioners as parties defendant in said suit, with leave to defend the same upon the merits thereof as they shall be advised.

CHARLES A. DEGRAFF,
WILLIAM CROOKS &
NICHOLAS DEGRAFF,
Petitioners.

W. P. CLOUGH,
Solicitor and Counsel for Petitioners.

42 And thereupon, afterwards, to wit, on the 20th day of July, A. D. 1875, Edwin M. Lewis, by his counsel, presents amendment to his answer; which, by leave of court, is filed of record, and being read is as follows, to wit:

In the circuit court of the United States for the eastern district of Pennsylvania. April sessions, 1875. No .

BETWEEN THE UNITED STATES OF AMERICA, plaintiffs,
and
EDWIN M. LEWIS ET AL., DEFENDANTS.

And now the said Edwin M. Lewis, one of the said defendants, by leave of the court first had and obtained, amends his answer to the bill of complaint filed in the above case by inserting therein, after the end of paragraph eight thereof, the following clause:

And he further saith that there has been brought to his notice, although the same has not been proved in bankruptcy, a claim against the said Jay Cooke, a member of the said firms of Jay Cooke & Co. and Jay Cooke, McCulloch & Co., on the part of one Peter P. Wintermute and one James Stinson, for sixty thousand nine hundred and forty-five dollars, ($60,945,) on which judgment was entered in favor of the said Wintermute and said Stinson in the supreme court of New York for the county of Chemung, on the 20th of September, 1873. An

appeal has been taken from said judgment, which is now pending. And he has further been informed that Edwin L. Stanton, receiver of the First National Bank of Washington, D. C., makes claim against
43 the individual estates of William G. Moorhead, Jay Cooke, Harris C. Fahnestock, and Henry D. Cooke, under the provisions of "An act to provide a national currency secured by pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, as stockholders of the said the First National Bank of Washington, D. C. Of the exact amount of said claim, however, this respondent is not accurately informed.

EDWIN M. LEWIS.

EASTERN DISTRICT OF PENNSYLVANIA, *ss*:

Edwin M. Lewis, the above-named respondent, being duly sworn, doth depose and say that the matters set forth in the above amendment to answer, so far as stated upon his own knowledge, are true, and so far as stated upon information derived from others, he believes to be true.

Sworn and subscribed this 16th day of July, A. D. 1875.

{ SEAL. SAMUEL BELL, U. S. COMR. }

SAMUEL BELL,
U. S. Commissioner.

44 And thereupon, afterwards, to wit, on the fifth day of October, A. D. 1875, the cause having been heard, the court ordered a decree to be prepared, which said decree was afterwards, to wit, on the eleventh day of October, A. D. 1875, filed of record, and being read, is as follows, to wit:

U. S. *vs.* LEWIS. } C. C. U. S. Eq.

The cause having been heard on the bill and answer, it is ordered
45 and decreed that the United States are entitled to be paid out of the assetts, whether money or other property, belonging to the separate estates of Jay Cooke, William G. Moorhead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, jr., which are in the hands of the defendant, Edwin M. Lewis, as trustee of the bankrupts above named, the amount due to the United States by Jay Cooke, McCulloch & Company, as stated in the bill and admitted by the answer, to wit, one hundred and twenty-one thousand nine hundred and five pounds two shillings sterling, (£121,905 2 0,) which, at the date of this decree, amounts to six hundred and eighty-eight thou-
46 sand seven hundred and sixty-three dollars and eighty-one cents, ($688,763.81,) payable in current money of the United States, together with interest thereon at the rate of six per cent. per annum, from the twenty-fifth day of September, 1873, and this sum ought to be paid to the United States out of said assetts by the said trustee in preference and priority to the claim of any other creditor of the said bankrupts, whether joint or separate, and to the extent that the said assetts shall be adequate after deducting the proper charges of the trustee for administering the trust for the United States, and upon which he
47 received the same. And it is further ordered that the United States are not required or bound, before enforcing such payment, to sell or dispose of the securities they may hold for the said debt due them, nor to account for the same before they are thus entitled. And

it is further ordered and decreed that the said defendant, Edwin M. Lewis, do pay to the United States the amount admitted to be in his hands in money, to wit, two hundred and sixty-seven thousand eight hundred and forty-four dollars and forty cents, ($267,844.40,) together with any interest he shall have received thereon up to the time of
48 payment on account of the said liability and indebtedness, and that the plaintiffs shall be entitled, without prejudice by reason of this decree, to apply for a decree, for further directions or further relief, either by way of payment or account, when they shall be advised so to do, in respect of the residue of the separate estates of the above-named bankrupts remaining in the hands of the defendant as trustee, which is subject to the liability above stated. And all questions respecting the rights of the said defendant (trustee) to subrogation to the rights of the United States, whether upon the securities in their hands
49 or the proceeds thereof, or against the remaining partners of the firm of Jay Cooke, McCulloch & Company, who have not been adjudicated bankrupts nor served with process, and the right of the said defendant trustee to an account of the administration of the said securities, and to an account as against said partners, and also all questions of costs, are reserved.

Per curiam.

And thereupon, afterwards, to wit, on the 21st day of October, A. D. 1875, by agreement of counsel, the answer of Edwin M. Lewis is amended as follows, to wit:

50 U. S. C. C., April sessions, 1875. In equity. No. 7.

THE UNITED STATES
vs.
EDWIN M. LEWIS.

It is agreed that the answer of Edwin M. Lewis, filed in above cause, be amended as of the 20th April, 1875, as follows, by adding: "It is admitted that the amounts stated in the amendment to the bill filed April 10th, 1875, amounting in the aggregate to $267,844.80, (two hundred and sixty-seven thousand eight hundred and forty-four $\frac{80}{100}$ dollars,) are in the hands of the said defendant, as trustee, as stated in said amendment.

R. L. ASHHURST, *for Deft.*
WILLIAM McMICHAEL,
For United States.
R. C. McMURTRIE, *for Dft.*

51 And thereupon, afterwards, to wit, on the twenty-third day of October, A. D. 1875, the respondent, by his attorney, R. L. Ashhurst, esq., appeals from the decree of the court made in the above case on the 11th day of October, A. D. 1875, to the Supreme Court of the United States, sitting at Washington, to the next term thereof, which said appeal was on the same day, to wit, the twenty-third day of October, A. D. 1875, allowed, and security designated as $1,000.00.

52 And thereupon, afterwards, to wit, on the thirteenth day of November, A. D. 1875, bond for security in $1,000 is filed, in the words following, to wit:

Know all men by these presents that we, Edwin M. Lewis, of Phila-

delphia, in the county of Philadelphia and State of Pennsylvania, and S. Weir Lewis, of Philadelphia, in the county of Philadelphia and State of Pennsylvania, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars, current money of the United States, to be paid to the said the United States of
53 America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this thirteenth day of November, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at Philadelphia, in the eastern district of Pennsylvania, in the circuit court of the United States for the said district, in a suit in equity depending in said court between the United States of America and the said Edwin M. Lewis, trustee in bankruptcy of the estate of Jay Cooke et al., of April sessions, 1875, No. , a decree was rendered against the said Edwin M. Lewis, and the said Edwin
54 M. Lewis having obtained an appeal to remove the said cause to the Supreme Court of the United States:

Now the condition of the above obligation is such that if the said obligors shall, in the event of the affirmance of said decree, well and truly pay, or cause to be paid, to the said the United States of America, the plaintiff in said suit, all lawful costs incurred in the above suit, then the above obligation to be void; otherwise to remain in full force and virtue.

EDWIN M. LEWIS. [SEAL.]
S. WEIR LEWIS. [SEAL.]

Witnesses:
SAMUEL BELL.
W. GRIER HIBLER.

55 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania:

I, Samuel Bell, clerk of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the said circuit court in a certain suit in equity therein lately depending, wherein the United States were complainants and Edwin M. Lewis, Hugh McCulloch, I. H. Puleston, and Frank H. Evans were respondents.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at Philadelphia, this first day of December, A. D. 1875, and in the one hundredth year of the Independence of the said United States.

[SEAL.] SAMUEL BELL,
Clerk Circuit Court U. States, East'n Dist. of Pa.

(Indorsement on cover:) No. 866. Edwin M. Lewis, trustee of Jay Cooke & Co., bankrupts, appellant, vs. The United States. E. Pennsylvania C. C. U. S. Filed 8 December, 1875.

C

Supreme Court of the United States.

No. 866.

EDWIN M. LEWIS,

Trustee in Bankruptcy of the estate of Jay Cooke & Co.,

vs.

THE UNITED STATES.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF OF ARGUMENT OF APPELLANTS.

R. L. ASHHURST,
J. C. BULLITT,
W. P. CLOUGH,
Of Counsel.

PHILADELPHIA:
ALLEN, LANE & SCOTT, PRINTERS, 233 SOUTH FIFTH STREET.
1876.

In the Supreme Court of the United States.

Edwin M. Lewis, Appellant,

vs.

The United States of America, Appellee.

No. 866.

APPEAL FROM DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

HISTORY OF THE CASE, INCLUDING STATEMENT OF FACTS AND ABSTRACT OF PLEADINGS.

In the year 1873 the firm of Jay Cooke, McCulloch & Co. was a firm carrying on business as bankers in London, England, consisting of ten partners, three of whom, Hugh McCulloch, J. H. Puleston, and Frank H. Evans, resided in London, (said Hugh McCulloch, however, being a citizen of Indiana and owning property there,) and the other seven, Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr., resided in the United States. These seven partners residing in the United States were also members of the firm of Jay Cooke & Co., which firm contained also one other partner, Mr. James A. Garland, residing in the city of New York. The said firm of Jay Cooke & Co. also carried on business as bankers in the cities of New

York, Philadelphia, and Washington. On the 18th of September, 1873, the firm of Jay Cooke & Co. stopped payment, and on the 25th of the same month a petition in bankruptcy was filed against them in the District Court of the United States for the Eastern District of Pennsylvania, and on the 26th of November, 1873, the said firm of Jay Cooke & Co., as well as the said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, James A. Garland, and Jay Cooke, Jr., members thereof, were, on said involuntary petition, adjudged bankrupts by the said District Court, and on the 30th of January, 1874, Edwin M. Lewis, the appellant here, was elected and duly confirmed by the court as trustee, under the forty-third section of "An act to establish a uniform system of bankruptcy throughout the United States," and on February 6th, 1874, by deed, duly approved under the said section, all the assets and estate of the said bankrupts were conveyed to him, in trust, for their creditors, according to the provisions of the said act.

At the time of the failure of the said Jay Cooke & Co., Jay Cooke, McCulloch & Co., the London firm, were indebted to the United States of America for a balance of deposit account kept with them as bankers by the United States for the Navy Department in the amount of some £132,610 9s. 8d. sterling. The said Jay Cooke, McCulloch & Co. did not suspend payment or become insolvent at the time of the failure of said Jay Cooke & Co., and, notwithstanding the bankruptcy of said Jay Cooke & Co. and said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr., common members of the said firms of said Jay Cooke & Co. and said Jay Cooke, McCulloch & Co., continued in business and apparently good credit until January 1st, 1874, when the said firm was reorganized, the bankrupt partners' names being dropped and other partners admitted, under the name of McCulloch & Co. During the interval, however, between the 18th of September, 1873, and the 26th of November of same year, the said debt due to the United States by Jay Cooke, McCulloch & Co. at the time of the suspension of Jay

Cooke & Co. had been reduced by payments and collections to £121,905 2s.; and the said Jay Cooke, McCulloch & Co., subsequent to the said 25th of September, 1873, deposited with the United States, the plaintiffs below, large amounts of securities and assets of different kinds. The said securities so deposited as collateral consisted of very large claims held by the said Jay Cooke, McCulloch & Co. against the said Jay Cooke & Co., the amounts of which are in dispute, and also of large amounts of bonds and stocks and warehouse receipts for railroad iron. It was, however, claimed by the United States that they had the right, at their option, to apply these collaterals to other debts due by said Jay Cooke, McCulloch & Co., arising from the continuance of the business after the bankruptcy of Jay Cooke & Co. These are fully set forth in the cross-bill and the answer thereto; but inasmuch as no decree has been made with relation thereto, and the court below took the view that the consideration of those matters should be postponed until the United States had been paid in full their claim, it is not necessary to go into a fuller enumeration of these securities at this point, since the possession by the United States of these securities and their values were deemed immaterial by the court below and decree made accordingly.

No action was taken against the said firm of Jay Cooke, McCulloch & Co. by the United States during the continuance of that firm's active business, nor is it pretended that any proceeding has ever been taken against that firm, or the successors, the firm of McCulloch & Co., or any of the partners remaining solvent after the failure of the American firm of Jay Cooke & Co. in September, 1873, or against the firm estate or the private estate of the non-bankrupt partners up to the present time, nor did the United States of America take any part in the early stages of the bankruptcy proceedings against the firm of Jay Cooke or its members. But in the spring of 1875, of April Sessions of that year, the United States of America filed their bill in the equity side of the Circuit Court of the United States for the Eastern District of Pennsylvania, wherein they set up and claimed the right to be paid the amount of said £121,905 2s.,

the balance of said deposit account due and owing September 25th, 1873, out of any assets coming from the individual estates of said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George B. Thomas, and Jay Cooke, Jr., in the hands of said Edwin M. Lewis, as trustee, appointed as aforesaid, in preference both to the creditors of Jay Cooke & Co. and to the individual creditors of the said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr., respectively, by virtue of the provisions of the act of 1797, chapter 74, section 5, which the United States claimed gave them the right to proceed by bill in equity directly against the separate estates of any of the partners, without regard to the condition of the firm of Jay Cooke, McCulloch & Co. or of the solvent members of that firm, without making demand of them or forcing them to insolvency, and without regard to the collaterals in the hands of the United States. The appellant, the said Edwin M. Lewis, also defendant below, filed his answer to said bill below to said term, admitting the balance due the United States, and that he had certain assets in his hands belonging to the individual estates of some of said partners, but setting up equities relied on to defeat the claim made thereunder; and also filed simultaneously in the same court a cross-bill against the United States and the said Hugh McCulloch, J. H. Puleston, and Frank H. Evans, solvent partners of said Jay Cooke, McCulloch & Co., praying an account of said collaterals in the hands of the said United States, and subrogation to the claim of the United States against the said McCulloch, Puleston, and Evans and the said Jay Cooke, McCulloch & Co., as well as against the said collaterals, if the United States should obtain payment out of the individual estates in his hands. The United States filed an answer to said cross-bill, admitting the securities in their hands, but insisting on their right to immediate payment, and denying that the possession of said securities affected their position.

A general replication was filed to this answer to the cross-bill. The case was heard by the Circuit Court on the original bill and

answer, the court sustaining the contention of the United States and considering the matter raised by the cross-bill as immaterial until the United States were paid their claim. The case was twice argued,—first at Philadelphia, before the circuit judge the Hon. William McKenna, and the district judge Hon. John Cadwalader, and afterwards at Erie, before his Honor Mr. Justice Strong, of this court, and his Honor the Judge of the Circuit Court, and on October 11th, 1875, decree was entered in the said court in favor of the United States of America, plaintiffs below, declaring the United States entitled to be paid out of any assets belonging to the separate estate of the said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr., in the hands of the said Edwin M. Lewis, trustee as aforesaid, in preference to and priority over any other creditors of the said bankrupts, whether joint or separate; and the United States were not bound before enforcing such payment to sell or dispose of their securities or account for the same; that the said Edwin M. Lewis should pay to the United States the amount admitted to be in his hands in money, viz., $267,844.80, belonging to the said separate estates. Further decree was to be made for further payments to the United States as moneys should be realized from the assets of said bankrupts.

Whereupon appeal was taken and duly allowed to this court.

ABSTRACT OF PLEADINGS.

The bill set forth the existence of the two firms above mentioned, Jay Cooke, McCulloch & Co., doing business in London, and Jay Cooke & Co., doing business in New York, and their common partners. It avers that Jay Cooke, McCulloch & Co. had been for a long time special agents of the Navy Department of the United States, and as such had in their hands as bankers a large amount of funds, the property of the United States; and that on the 18th of September, 1873, the balance due to the United States was £170,055 18s. 11d. sterling, which had

been reduced by payments to £121,905 2s. sterling. The bankruptcy of Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr. was also therein recited, and the appointment of Edwin M. Lewis, appellant, as trustee of their estate.

The bill also averred that considerable separate or individual estates of said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr. had come into the hands of the said trustee, and proceeded to claim by force and virtue of the act of Congress, in such case made and provided, that the United States immediately upon the said Jay Cooke, William G Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr. becoming bankrupts became and were entitled to receive payment of the debt due them by the said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr., as members of said firm of Jay Cooke, McCulloch & Co., with preference of payment of the same prior to the application of the said private estates to the payment of any other class of creditors, and that the United States were entitled to have an account stated and settled of the said separate estates and to have the said estates, property, and assets sold and disposed of, and the proceeds applied in payment of the said debt.

The bill also charged that the United States were entitled to this priority of payment without limit or condition of exhausting their remedies against the partnership of Jay Cooke, McCulloch & Co. or their assets; that the right of the United States was a legal one, and they were entitled to payment in preference to the individual or private creditors of said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr., as well as over the creditors of said Jay Cooke & Co., and that the equity applying private estates in the first instance to private debts must give way to the United States' legal claim of priority.

The bill also charged that the United States were not bound to prove their claim in bankruptcy, and were not bound by the

bankrupt act, but were entitled to bring this bill in equity or to prove their debts in the ordinary course of bankruptcy at their option.

The bill prayed the court to ascertain and determine the amounts due to the United States by the said bankrupt debtors, who were partners in the firm of Jay Cooke, McCulloch & Co. at the time of their bankruptcy; to declare and establish the right of the United States in respect of their debt to have and receive payment of the same, with interest, out of the proceeds of the said private estates of said Jay Cooke, William G. Moorhead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr., with priority over the right of any other creditors; also, to declare that the United States were entitled to have an account taken by the said court of the assets received by the appellant from the private estates of said bankrupt debtors and his administration thereof, and to have the said assets sold and converted into money with reasonable diligence and the proceeds applied as aforesaid; and also prayed in the alternative, if the court should declare that the United States were not entitled to any of the particulars of the relief above mentioned until they had exhausted their remedies against the members of the firm of Jay Cooke, McCulloch & Co., not bankrupts, for an injunction against the disposal of the proceeds of any of the private estates until the result of the proceedings against such solvent partners of the firm of Jay Cooke, McCulloch & Co. should be determined.

By an amendment of their bill the United States further averred that the appellant had received from the private estates of the bankrupts the following amounts:—

From the estate of			William G. Moorhead, . .	$184,871 71
"	"	"	H. C. Fahnestock, . .	46,432 28
"	"	"	Pitt Cooke, ...	18,275 51
"	"	"	George C. Thomas, . .	15,274 70
"	"	"	Jay Cooke, Jr., . . .	2,990 60
In the aggregate amounting to				$267,844 80

and claimed that they were entitled to be paid the said sums of money, as being money in the hands of the appellant as trustee primarily applicable to the debt due the United States, and prayed for additional relief by a decree for the immediate payment to the said United States of the said sums of money.

The answer in substance admitted the matters averred in the bill, and set forth that the said McCulloch, Puleston, and Evans continued up to the time of the filing of said answer carrying on the business of bankers in the said city of London, and had never been declared or ascertained to be bankrupt or insolvent; that there were assets of the late firm of Jay Cooke, McCulloch & Co. in the hands of the said solvent partners of the said firm to a large amount both in America and England; that at least one of said solvent partners had considerable individual and separate property and estate in this country; that after the contraction of the debt for which the bill was brought the said solvent partners of Jay Cooke, McCulloch & Co. being in possession of the firm assets, transferred a very large portion thereof to the United States of America as collateral security for the debt due the United States.

The answer further recited the bankruptcy proceedings by which title to the bankrupt estate was vested in said Edwin M. Lewis, the appellant, and further set forth that debts to a very large amount had been proved against the estate of said Jay Cooke & Co., and also large individual debts had been proved or brought to the notice of said appellant against the estates of said individual partners in his hands, particularly against the estate of William G. Moorhead, from which the largest amount of cash in his hands has been derived; that the separate debt of Charles De Graff *et al.* had been provisionally proved large enough to absorb said balance.

The answer further raised the points (1 and 2) that the bill did not allege a legal or declared insolvency of said Jay Cooke, McCulloch & Co., or any demand of them or the solvent partners in that firm for the debt for which the bill was brought, or their refusal or inability to pay the same; (3 and 4) that there was no allegation in said bill of any liquidation of the firm

affairs of said Jay Cooke, McCulloch & Co. or that there were not adequate firm assets to pay their debts; (5) that the relief plaintiffs sought was contrary to the equity rule that the private estates should be first appropriated to private creditors and the partnership estates to partnership creditors, so that the estates of said bankrupt partners of Jay Cooke, McCulloch & Co. must be primarily applied to their private debts, and only the surplus thereof to firm debts; (6) that even as to said surplus, the rules of equity required that as these individual bankrupts were members of two firms, the surplus of their estates, after paying their private debts, must be divided between said firms according to the rules of equity, that is, in proportion to their respective indebtedness, and the priority of the United States could only come out of the fund of which, if they were not a preferred creditor, they would be entitled to a dividend, viz., the share of the surplus private estate coming to the creditors of Jay Cooke, McCulloch & Co.; (7) that as the United States' claim to a priority under the statute must be based on the fact of an insolvency or bankruptcy, they must submit to the rules of bankruptcy as to distribution and the principles of priority established between different classes of creditors under the bankrupt law; (8) that there being no declared insolvency of Jay Cooke, McCulloch & Co., the debtor of the United States, the United States were not entitled to proceed at all by their priority under the act of 1797, unless the filing of their bill could be treated as a declaration of insolvency, in which case, being posterior to the bankruptcy of the American members of said Jay Cooke, McCulloch & Co., which dated from the 25th of September, 1873, that could not divest the rights of creditors vested under such proceedings; (9) that the United States had not proved their claims in bankruptcy, and such proof was necessary to enable them to proceed against the assets of the bankrupt estate, and that the Circuit Court had no original jurisdiction to intervene or control the administration of the estate under the bankrupt law; (10) because the bill did not show a case for the interposition of a court of equity to aid in collecting a debt, since it was not shown or alleged that the legal assets of

Jay Cooke, McCulloch & Co. were exhausted or that the plaintiffs had not adequate redress at law.

The answer further demanded that the United States, the appellee, should first exhaust the collaterals in their hands before proceeding in this mode, and failing that, that the appellant should be subrogated to the benefit of said collaterals. This last portion of the answer is more fully elaborated in the cross-bill, which will be found in full in the record, but which, in view of the grounds of the decision below, it seems unnecessary to set forth at greater length here.

DECREE OF COURT BELOW.

The cause having been heard on the bill and answer, it is ordered and decreed that the United States are entitled to be paid out of the assets, whether money or other property, belonging to the separate estates of Jay Cooke, William G. Moorhead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr., which are in the hands of the defendant, Edwin M. Lewis, as trustee of the bankrupts above named—the amount due to the United States by Jay Cooke, McCulloch & Co., as stated in the bill and admitted by the answer, to wit, one hundred and twenty-one thousand nine hundred and five pounds two shillings sterling (£121,905.2), which, at the date of this decree, amounts to six hundred and eighty-eight thousand seven hundred and sixty-three dollars and eighty-one cents ($688,763.81), payable in current money of the United States, together with interest thereon at the rate of six per cent. per annum, from the twenty-fifth day of September, 1873; and this sum ought to be paid to the United States out of said assets, by the said trustee, in preference and priority to the claim of any other creditor of the said bankrupts, whether joint or separate, and to the extent that the said assets shall be adequate, after deducting the proper charges of the trustee for administering the trust for the United States, and upon which he received the same. And it is further ordered, that the United States are not required or bound, before enforcing such payment, to sell or

dispose of the securities they may hold for the said debt due them, nor to account for the same before they are thus entitled. And it is further ordered and decreed, that the said defendant, Edwin M. Lewis, do pay to the United States the amount admitted to be in his hands in money, to wit, two hundred and sixty-seven thousand eight hundred and forty-four dollars and forty cents ($267,844.40), together with any interest he shall have received thereon to the time of payment, on account of the said liability and indebtedness, and that the plaintiffs shall be entitled, without prejudice by reason of this decree, to apply for a decree for further directions or further relief, either by way of payment or account, when they shall be advised so to do, in respect of the residue of the separate estates of the above-named bankrupts remaining in the hands of the defendant, as trustee, which is subject to the liability above stated. And all questions respecting the rights of the said defendant, trustee, to subrogation to the rights of the United States, whether upon the securities in their hands or the proceeds thereof, or against the remaining partners of the firm of Jay Cooke, McCulloch & Co., who have not been adjudicated bankrupts, nor served with process, and the right of said defendant, trustee, to an account of the administration of the said securities, and to an account as against said partners, and also all questions of costs, are reserved.

POINTS ASSIGNED FOR ERROR.

We assign here for error—

I. That the learned court erred in holding that the plaintiffs were entitled to proceed in the Circuit Court of the United States against the assets of the said bankrupts, without having proved their claim in bankruptcy.

II. That the learned court erred in holding that the said Circuit Court had original jurisdiction in a bill of equity of this nature, filed not by a person claiming an adverse interest, but by a creditor for an administration of the bankrupt estate.

III. That the learned court erred in holding that the bill showed a case for equitable jurisdiction, it not appearing that the legal assets of Jay Cooke, McCulloch & Co. were exhausted, so that the plaintiffs were compelled to resort to the aid of a court of equity to obtain payment out of equitable assets.

IV. That the learned court erred in holding that the United States were entitled to claim payment immediately out of the assets in the hands of the appellant, without resorting in the first place to its collaterals, and were not bound before proceeding here to proceed against the solvent partners, and against the firm assets of Jay Cooke, McCulloch & Co.

V. The learned court erred in holding that the United States were entitled to proceed against the said assets of the estates of the bankrupt partners before any legal or declared insolvency of Jay Cooke, McCulloch & Co., their principal debtor.

VI. That the learned court erred in holding that the preference of the United States, as a creditor of the firm of Jay Cooke, McCulloch & Co., applied to the private estates of the individual bankrupt partners of said firm, superseding the equitable rule that private estates are first appropriated to private creditors, and partnership estates to partnership creditors, as an absolute preference out of said private estates, only subject to the expenses of the trust, in lieu of holding, as the court should have done, that their preference only applied to the same fund out of which, had they not been preferred creditors, they would be entitled to dividends—that is, the surplus of such private estates, after paying the private creditors of each respective private estate.

VII. That the learned court erred in not decreeing that out of the private estates of the bankrupt partners of Jay Cooke, McCulloch & Co., private creditors were in equity entitled to be first paid, and that the surpluses of such private estates should be in equity divided *pro rata* between the firm estates of the firms of which said bankrupts had been members, and that the

right of preference of the United States was restricted to the share of such surpluses properly distributable to the creditors of Jay Cooke, McCulloch & Co.

BRIEF OF ARGUMENT FOR APPELLANT.

I.

1. As to the first point assigned for error. "That the learned court erred in holding that the plaintiffs were entitled to proceed in the Circuit Court of the United States against the assets of the said bankrupts, without having proved their claim in bankruptcy."

The United States claim here under the trust arising under the bankrupt law, by which the property, late of the bankrupts, has been vested in the appellant as trustee, and their preference, if they are entitled to any, must be based on the fact of such bankruptcy. By the bankrupt law (section 5077, Rev. Stat.) it is provided, to entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition, in writing, under oath, setting forth the demand, consideration, and securities held, and payments made; and the other several well-known requirements of proof in bankruptcy. The section ends with a provision that no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

By section 5076 the officer before whom such proofs are to be made is specified, and the jurisdiction of the District Court over such proofs or depositions seems entirely clear under all the provisions of the bankrupt act.

The bill filed by the United States in this case in the Circuit Court certainly in no respect corresponds to a proof in any way, nor can it be argued to be a deposition for proof of claim under the statute. It is not under oath; it does not state what securities are held, and this matter has only been developed by the answer to the cross-bill, nor does it contain any of the other allegations required by the section. It may be unnecessary that the United States should go through the form of proof provided

by the act by which it is entitled to a preference, but if it claims, as it must under the trust created by the bankruptcy, it is hard to see how the necessity of proof can be avoided.

II.

2. As to the second point assigned for error. "That the learned court erred in holding that the said Circuit Court had original jurisdiction of a bill in equity of this nature, filed not by a person claiming adverse interest, but by a creditor for an administration of the bankrupt estate."

We submit for the consideration of the court whether, if, as the plaintiffs below conceded, the United States claimed not above, or against, but under the trust arising under the bankrupt law, they must not submit to the statutory jurisdiction and form of remedy provided by the bankrupt act under which the trust arises. The case of Conrad *vs.* Atlantic Insurance Co., 1 Peters, 439, shows clearly that the United States, in cases of bankruptcy, claims directly under the trust arising from the bankrupt law.

In the first section of the bankrupt act, Revised Statutes, title 61, section 4972, it is expressly provided that the jurisdiction of the District Court shall extend (5th) to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors. The jurisdiction given to the Circuit Court by section 4986, ordinarily called the supervisory jurisdiction, has been uniformly held to be merely appellate; that the jurisdiction conferred by section 4979 is confined in terms to the suits in law and equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching the property or rights of the bankrupt, to which the power of collecting debts due the bankrupt is added by the amendment of the act of June 22d, 1874, paragraph 3. As jurisdiction cannot be claimed for the Circuit Court under either of these sections, it must be claimed under the ordinary equity jurisdiction of the court under the judiciary act, and the question is therefore presented whether the United States can set

aside the direct provisions of section 4972, giving jurisdiction of trusts arising under this act directly to the District Court, and can proceed to enforce a statutory trust without regard to the statute.

Of course, however, if the decision in the case of United States *vs.* Heron, 20 Wallace, 257, is to be construed as applying to all parts of the bankrupt act, so that the United States is not bound by any of its provisions, these first and second points need not be considered. But while that case settles that the clauses of the bankrupt act as to discharge do not apply to the United States where they proceed against their debtor at law, yet, to hold that this decision applied to a case where the United States, claiming rights conceded and reserved to them by the terms of the sections as to distribution, sought to obtain part of the funds passing to the trustee under the trust created by the act, would seem to carry that decision very far.

Mr. Justice Clifford, in delivering that opinion, expressly says, (page 257,) "Confessedly, the United States is not named in any of the provisions of the act providing for discharge." In the sections relating to distribution, the United States is named, (section 28,) and given certain priorities.

The difference is wide between the debtor's liability outside of bankruptcy, and the effect of the act on property passing under it.

III.

In regard to the third point:—

3. "That the learned court erred in holding that the bill showed a case for equitable jurisdiction, it not appearing that the legal assets of Jay Cooke, McCulloch & Co. were exhausted so that the plaintiffs were compelled to resort to the aid of a court of equity to obtain payment out of equitable assets."

If this bill is maintained, as it would seem it only can be, as a bill to reach equitable assets, which seems to be the ground on which the various bills have been maintained by which the assets of a deceased partner's estate have been made applicable

to the partnership debts, it would seem to be a fatal defect in that there is no averment that the legal assets have been exhausted, and that therefore the complainant is remediless at law. This is not averred in the bill, and the answer directly asserts the existence of legal assets, which could be reached in the ordinary course of proceeding. Nothing can be clearer than that in the courts of the United States at least, evidence that the plaintiff is remediless at law is absolutely necessary to enable him to support proceedings for equitable relief to recover his debt. In Parker *vs.* Winnipesaukee, 2 Black, 545, it was held that the sixth section of the judiciary act absolutely ousts, as to the courts of the United States, all jurisdiction when the plaintiff has not averred and shown himself to be without remedy at law. It is not a mere rule of proceeding for the chancellor, elastic according to the occasion, but a definite failure of jurisdiction, unless a lack of legal remedy be established.

And this doctrine has very recently been reaffirmed in the cases of Reese *vs.* City of Watertown, 19 Wallace, 107, and Hine *vs.* The Commissioners, 19 Wallace, 655. The bills there were dismissed, because no reason was shown that the plaintiff could not have redress at law, and the court went so far as to say that however probable it might be that ordinary legal remedies would prove unavailing, as was in fact shown in that case, yet relief in equity, for recovery of debts, could not be called in, unless the impossibility of such relief was shown. The ordinary method in which it has been held that the exhaustion of legal assets, and, therefore, the impossibility of plaintiffs obtaining relief by law, should be shown, is that after judgment has been obtained in due form, writ of execution should be returned *nulla bona.*

Suydam *vs.* North-western Insurance Company, 1 P. F. Smith, 394.

And no state of facts will excuse such return. McIlwain *vs.* Willis, 9 Wend., 548. His Honor Mr. Justice Strong, in Suydam *vs.* North-western Insurance Company, above cited, says, "That this is the settled rule all authorities agree," and he cites Angle *vs.* Draper, 1 Verp. Case, 371; Hendricks *vs.* Johnson,

2 John. Ch., 283; Brinkerhoff *vs.* Brown, 4 John. Ch., 671; Beck *vs.* Burdell, 1 Paige.

No judgment has, in this action, been obtained, and it is freely admitted that no attempt has been made to collect the debt by law, either against or out of the assets of the firm, or of the solvent partners of Jay Cooke, McCulloch & Co.

IV.

The fourth point assigned for error relates to the questions raised in the answer, whether the United States is bound, in the first place, to resort to its collaterals and also to the firm assets and solvent partners before proceeding here against the trust estates of the bankrupt partners, viz., "That the learned court erred in holding that the United States were entitled to claim payment immediately out of the assets in the hands of the appellant without resorting in the first place to its collaterals, and were not bound before proceeding here to proceed against the solvent partners and against the firm assets of Jay Cooke, McCulloch & Co."

We can concede that it is true that, as a general rule, the right of subrogation is a right against the debtor which cannot be exercised against the paramount creditor's rights, but that it is the duty of him who claims subrogation first to pay the claim of the creditor and then to ask resort upon his security; but it is well established that, under special circumstances raising a peculiar equity, this general rule may be set aside, and the paramount creditor compelled first to exhaust the fund on which he has the only claim.

Vide Bispham's Principles of Equity, paragraphs 337, 339, and cases cited in notes.

One of the cases in which such equity was held to exist was Hayes *vs.* Ward, 4 Johns. Ch., 129. In this case the creditor held a mortgage on property in New Jersey, where all parties resided, given by principal debtor. He brought suit against the surety in New York, where the latter had gone on business. The surety then brought a bill in equity to enjoin this suit until the

creditor should exhaust the mortgage given by the principal debtor, averring that the creditor's conduct had been such as to render this mortgage of doubtful validity, and the injunction was granted.

It has thus been held that where the paramount creditor has been guilty of negligence and default in his use of the fund on which he has the only claim, he may be restrained by the other creditors from coming on the fund which is their only reliance, or when the paramount creditor places one of the funds beyond his reach, with the knowledge that the debt cannot be satisfied from the other without damage to third persons, he will be restrained in the interest of the suffering creditors from resort to the fund on which they claim. This doctrine is recognized in Paxson *vs.* Harrier, a Pennsylvania case, reported in 1 Jones, 312, where a mortgage creditor having voluntarily released the premises last retained by the mortgagor, was held to have forfeited his right to claim against the premises earlier conveyed; and a similar decision on this question of negligence in the paramount creditor is reported in Stevens *vs.* Cooper, 1 Johnson's Chancery, 425.

"It is an equally well-settled rule, that if one party has deprived the other of his right to enforce a contribution or, what is here deemed equivalent, the right of substitution in the place of the mortgagee, he will be excluded from so much of his demand as the party might have enforced but for the interference of him who has thus discharged a portion of the lien."

Parkman *vs.* Welch, 19 Pickering, 231.

This was a similar case to that last above cited.

So in Mount *vs.* Potts, 8 C. E. Green, 188, almost identical with Paxson *vs.* Harrier, *supra.*

It would seem that the conduct of the plaintiffs below in allowing the immediate debtor, the firm of Jay Cooke McCulloch & Co., to continue in business for so long a period without interfering with or controlling their management or disposition of their assets, will go far towards establishing such a case of negligence or default on their part as would entitle the creditors who have no resort against the partnership assets of Jay Cooke,

McCulloch & Co., or the estate of the partners of that firm not members of the firm of Jay Cooke & Co., to demand that the plaintiffs below should be restrained from coming upon these assets which constitute the only reliance of the creditors here.

Is there not also a further equity on behalf of the individual creditors and the creditors of Jay Cooke & Co., in that the firm of Jay Cooke, McCulloch & Co., doing business in so remote a place, out of the jurisdiction of this court, their right of subrogation, after payment of this debt, would be practically hopeless, while the United States, who entered into the foreign contracts from which this debt has originated, have far greater facilities and powers for collecting their debt from the partners resident abroad, from the firm doing business abroad, and from the assets either abroad or widely scattered, than the appellant, if subrogated, could possibly have; so that a further equity would arise here for restraint, in that the defendant's rights by subrogation would become practically unavailing, both by lapse of time before final decree to that effect could possibly be obtained and by distance of persons and property.

In *Ex parte* Wilson, 7 L. R. Ch. Appeals, 493, it was held that when a bankrupt had estates both in England and Brazil, a creditor living in England, having claimed on the Brazilian fund, could receive no dividend until the other creditors had obtained as much as the amount of the dividend received by him in Brazil.

This case was ruled on Selkrig *vs.* Davis, 2 Rose, 318, which decided that no one can come in under an English commission unless he throw into hotch-pot what he has received under a foreign commission.

See, also, Goldsmid *vs.* Cazenove, 7 H. L. R., 785, a similar case.

With regard to the further argument advanced in the court below, that the right of defendant below, even to subrogation, must depend upon the state of the accounts between the partners and the firms of Jay Cooke & Co. and Jay Cooke, McCulloch & Co.,—it being alleged that there are balances due by the bankrupt partners to the solvent partners exceeding the

value of the collaterals,—it is submitted that this would, if sustained, by means of a claim on the part of the United States, practically secure for Jay Cooke, McCulloch & Co. a preference over the other creditors of Jay Cooke & Co. But the whole argument is founded on a misapprehension of the facts. While Jay Cooke & Co. may be debtors to Jay Cooke, McCulloch & Co., the bankrupt partners of Jay Cooke, McCulloch & Co. are not debtors to the solvent partners of that firm, and the allegation that they are is put in issue by the answer. Therefore, there is no possibility of bringing the state of the accounts between Jay Cooke & Co. and Jay Cooke, McCulloch & Co., distinct firms, having partners in each, not members of the other, into the ascertainments of the equities in this case.

V.

Our fifth point is "The court erred in holding that the United States were entitled to proceed against the assets of the estates of the bankrupt partners before any legal or declared insolvency of Jay Cooke, McCulloch & Co., the principal debtors." The act of 1797, under which the United States claim their priority, provides that whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority thus given, it is provided, shall extend to cases where the debtor, not having sufficient property to pay all his debts, makes a voluntary assignment, or his effects are attached, the rule of bankruptcy arises. Now, has the case arisen to give the United States their preference, to bring into operation in fact the act of 1797, and if so, when did the facts occur to call those provisions into operation? Who is the debtor of the United States? Clearly, the firm of Jay Cooke, McCulloch & Co. They are, in the eye of equity, the being, the existence, who contracted with the United States, and who, therefore, is primarily their debtor.

In The United States *vs.* Hoe *et al.*, 3 Cranch, 73; Prince *vs.*

Bartlett, 8 Cranch, 43, it is laid down that in case of insolvency the United States are not entitled to priority of payment unless the insolvency be a legal or known insolvency, manifested by some notorious act of the debtor. Can it be that the debtor of the United States, whose legal or known insolvency is to bring in the act and call for the application of the provisions as to priority, can be other than the firm with whom the United States contracted? Suppose the case, where the principle would be the same, of a solvent firm of large means, the debtor of the United States, able to pay all its debts, and habitually paying them on demand, and suppose one partner in that firm largely insolvent and bankrupt, and his assets in course of distribution to his creditors, to whom they would yield but a moderate dividend on their claims. Can it be contended that the United States would have the right, leaving the firm, their direct debtors, with its solvent partners in unassailed solvency, from whom they might receive their full payment on demand, as well as any of their other creditors, and from caprice, fraudulent connivance, or any other reason, to pick out the estate of the one bankrupt partner, saying, we elect, because this man is insolvent, to consider him our debtor, and we will take our whole claim out of his estate alone, under the priority given us by the act of 1797, and leave his other creditors to be paid the best way they could, whether by a claim for subrogation on the part of the assignee in bankruptcy, or such other long and expensive litigation as he might be able to undertake against the strong and solvent firm? Can it be that the intention of the act is that if the debtor of the United States be a partnership, the insolvency of any one of the members of that firm shall be such insolvency as is meant by the act, to vest the priority of the United States? In the case of The United States *vs.* Sheldon & Co., 1 Brockenborough, 517, Chief Justice Marshall seems clearly to indicate that he entertained a different construction of the act, saying that it was a declared insolvency of the firm which called into action the priority of the United States.

If this view is recognized, it is of course clear that the claim of the United States to maintain their bill must be based on the

legal and declared insolvency of Jay Cooke, McCulloch & Co. No averment of such insolvency is made in the bill, and the existence of any such insolvency is expressly denied in the answer, and on this point the appellees should at once have been declared to have been out of the court, unless it can be considered that the mere filing of this bill by the United States is to be treated as a declaration of insolvency of Jay Cooke, McCulloch & Co.

But even if such were to be the case, it could not help the appellees, because, by the bankruptcy of Jay Cooke & Co., who failed September 18th, 1873, against whom petition was filed September 25th, 1873, on which adjudication was made November 26th, 1873, the assets of the partners in that firm were then by relation vested in the trustee for the benefit of all their creditors equally, saving the preference, &c. reserved to the United States by the bankrupt act; but the United States had then not claimed, in any way, to be their creditor. Then there was no insolvency known or declared, or otherwise, of Jay Cooke, McCulloch & Co., which, as argued above, was needed to vest the priority of the United States, and by reason of the trust created by relation, as of the day of petition filed, the estate was vested in the trustee for creditors by relation, while the debtor of the United States was solvent. In the case of Conrad *vs.* Atlantic Insurance Company, 1 Peters, 439, it was held that the priority of the United States vested no specific or general lien, whether accompanied or not by possession. In this case, it was not only a lien, but an absolute right of property vested in the trustee for creditors in their proportions under the bankrupt law before the event occurred, if it ever occurred, which entitles the United States to claim their priority.

The same doctrine was laid down in Brent *vs.* The Bank, 10 Peters, 596. The court there repeat, that the priority of the United States affects no lien created before the event takes place, giving the United States priority, and add, that the United States should come in as other suitors in equity, though they might have other powers of enforcing their priority before the

estate goes into the hands of one holding for creditors. Yet, when they come in under such administration, they can only do so by complying with equitable rules, and can only claim such relief as they may be entitled to in equity in good conscience. The United States has no common law or prerogative right of priority. As Mr. Justice Story says, "The right of priority of debts due the government was prerogative of the crown, well known to the common law. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded on the actual provisions of their statutes." United States Bank *vs.* Bank of North Carolina, 6 Peters, 35.

And if the statute does not give them priority in this case, because the event necessary to give rise to it either has not occurred at all, or did not occur until long after the assets in question were vested in the trustee for their creditors then existing, they cannot claim preference. The rule laid down by his Honor Mr. Justice Strong, when sitting in the Supreme Court of Pennsylvania, clearly shows that the creditors, as existing at the time of the bankruptcy of the partners of the firm of Jay Cooke & Co., took a vested interest. Miller's Appeal, 11 Casey, 481. The case being one of a voluntary assignment, he says:—

"By the deed of assignment, the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors, and each creditor owned such a proportional part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but whatever it was, he took it under the deed and it was only as a part owner that he had any standing in court when the distribution came to be made.

"It is not as a creditor that he is entitled to a distributive share of the trust fund. His rights are those of an *owner*, by virtue of the deed of assignment."

And this case has very recently been confirmed and recognized as the law of Pennsylvania in Graef's Appeal, second volume of Weekly Notes of Cases, (Philadelphia,) page 104, decided by Sharswood, J. If the creditors, as then existing, took a vested

right, it would seem clear, under the decisions given above, (Conrad *vs.* Insurance Company, Brent *vs.* the Bank,) that no event subsequently happening could call into activity the priority of the United States so as to impair their rights.

VI.

The sixth point assigned for error is as follows:—

"That the learned court erred in holding that the preference of the United States as a creditor of the firm of Jay Cooke, McCulloch & Co. applied to the private estates of the individual bankrupt partners of said firm, superseding the equitable rule that private estates are first appropriated to private creditors and partnership estates to partnership creditors, as an absolute preference out of said private estates, only subject to the expenses of the trust, in lieu of holding, as the court should have done, that their preference only applied to the same fund out of which, had they not been preferred creditors, they would be entitled to dividend—that is, the surplus of such private estates after paying the private creditors of each respective private estate."

The important question involved in consideration of this point is whether or not the United States, creditors of Jay Cooke, McCulloch & Co., are entitled to stand directly and immediately as creditors of the individuals, members of both the firms of Jay Cooke & Co. and Jay Cooke, McCulloch & Co., and as such to claim an absolute priority of payment out of the estates of such bankrupt partners, Messrs. Jay Cooke, William G. Moorhead, &c., not only over the firm creditors of Jay Cooke & Co., but over the individual creditors of said partners. And here we humbly urge that the learned judge of Circuit Court as well as counsel for appellee, in their briefs here and below, have gone astray in their reasoning by treating the matter as standing on the mere legal relation of debtor and creditor, and overlooking that by reason of the bankruptcy and statutory assignment worked thereby, the importance and relevancy of the relation of debtor and creditor is in a measure superseded, and the case

stands now to be decided on the principle of the equitable ownerships of the respective funds in the hands of the trustee. Judge Strong (in Miller's Appeal, 11 Casey, 481) has clearly shown the changed relation of parties by reason of voluntary assignment, and the altered position in many respects the case then assumes. In that case, as we have seen, he holds that, by the deed of assignment, the equitable ownership of all the assigned property passes to the creditors, and that they claim thereunder as owners.

In equity, it is almost, if not quite, always in the light of equitable ownership, rather than that of creditor and debtor, that the parties come before the court. This, in cases of voluntary assignment, of course results from the terms of the deed; in bankruptcy or insolvency under State laws there is a statutory assignment by which the creditors become vested as equitable owners with a right in the estate, and in the case of decedents, also, the law also implies an assignment for benefit of creditors of personalty, so that by operation of law the executors or administrators virtually stand seized of the estate in trust for the creditors, at least as regards personalty.

The law, in its rough reaching after justice, deals always with the debtor as in possession of his property, and the creditor's right against the property, therefore, is always connected with and dependent on his claim against his debtor. Thus, in law, we have a principle of distinction between joint debts and joint and several debts, and the distinction is also made between the right of a joint or partnership credit against one of the partners, and the claim of an individual creditor attempted to be asserted against the firm, that in the former case the joint creditor is also the creditor of the individual and consequently may proceed against him, while the individual creditor is in no sense the creditor of the firm. And thus in law the joint creditor may levy upon and sell the individual estate of one of his debtors, while the separate creditor can only seize or attach the right of the interest of his debtor in the firm.

The view equity takes of this matter is widely different. Equity here, like the civil law, recognizes the firm as an entity,

a being, having its own assets, its own obligations, as the individual partner has his. So Parsons treats a partnership as being a *quasi* corporation. Thence arises the division of funds into the social fund, as Chief Justice Marshall calls the partnership estate, and the individual or separate funds; and whenever equity has the distribution of the assets, and they come under the control of an equity tribunal by reason of a trust expressed or implied, the trust is held to be of the private fund, primarily for the private debts, and of the surplus only for joint debts, just as the partnership or social fund is held in trust for the partnership creditors, with the surplus over for individual creditors. Equity now regards the right of the private creditors in the private fund as sacred and indefeasible as that of partnership creditors on the social fund, and the right thus vested and the property passing to each class as joint proprietors of their respective funds, it becomes clear that any priority, even that of the United States, can only be allowed or declared out of that fund in which an ordinary creditor of the same estate would share. And the ground of this principle is not merely convenience. It is not only, as some judges and writers have treated it, a convenient rule of distribution, but is recognized by the Supreme Court of the United States, in Murrill *vs.* Neill, 8 Howard, 420, as a rule of natural equity and justice; and so Chancellor Kent treats it, volume III. Commentaries, pages 65 and 66. Equity demands that the funds should be applied respectively to the debts of those supposed to have advanced their money on the faith of each fund respectively,—the separate estate to the individual creditor and the joint estate to the firm creditor. To take up this question, however, systematically, we should divide the argument upon it into two heads:—

1. As to the right, generally, of partnership creditors to come on the individual estate of a partner.

2. As to the right of the United States as a preferred creditor, and whether as such its preference can extend further than to

the fund out of which, if not preferred, it would have claimed dividend.

(1.) As to the right, generally, of the creditor of a firm to prove against the estate of the individual in the first instance.

It seems now well settled, since Lord Eldon's decision in *Ex parte* Taitt, 16 Ves., Jr., 193, where he follows Lord Rosslyn's ruling, (*Ex parte* Elton, 3 Ves., Jr., 240,) overturning Lord Thurlow's views and restoring Lord Hardwick's rule, in Twiss *vs.* Massey, 1 Atkins, 667, and Lord King's, in *Ex parte* Cooke, 2 P. Williams, 500, that the firm creditors cannot prove against the individual estate in competition with the separate creditors, but must wait until their claims are paid in full, when the surplus may be transferred for division among joint creditors.

The English courts allow two exceptions to this rule:—

First.—That separate creditors are not to receive interest on their claims prior to payment of principal of claims of firm creditor.

Ex parte Wood, 5 Jur., 1115.

Second.—That if there is no joint estate at all and no solvent partner, the joint creditors may come in on the separate estates, *pari passu*, with separate creditors.

But this last exception has been carefully restricted and most literally construed.

There must be absolutely no joint estate whatsoever.

Thus, in *Ex parte* Kennedy, 2 De Gex, MacN. & G., 229, the petition of a joint creditor to prove against the separate estate was refused by Lord J. Knight Bruce, although the joint estate was not more than enough to pay costs.

And in *Ex parte* Peaks, 2 Rose, 54, the joint estate was averred to amount to £1 11s. 6d. only, but Lord Eldon said, "If there be, in fact, any joint property, however trifling, it is an answer to the application."

So *Ex parte* Harris, 1 Mad., 583.

In the recent case of Lodge *vs.* Pritchard, 1 De Gex, Jones & Smith, 610, Lord J. Turner, after going over all the cases, adhered to the rule that the separate creditors must be paid in full before the joint creditors could come on the separate estates, although the joint estates had then been fully distributed; and that although there was no joint estate outstanding at the time of the application, yet there having been a joint estate of which the joint creditors had received the benefit, it was held the rule must apply, and they could not come in *pari passu* with separate creditors.

The English rule was adopted by the Supreme Court of the United States in the case of Murrill *vs.* Neill, 8 Howard, 420. Mr. Justice Daniel, delivering the opinion of the court, lays down this rule absolutely and as a rule of equality and justice, not merely of convenient distribution, and he goes so far as to say that the exception made by the English cases, where there are no joint estates, cannot be reconciled with the reason or equity on which the general rule is founded, and adds that it is not recognized by the courts of this country. In a carefully considered case in Maryland, McCulloch *vs.* Dashiell, 1 Har. & Gill, 103, the Court of Appeals declared that they adopted the old English rule without the exception (in that case there being a joint estate of merely nominal amount, some thirty-five dollars). The rule, without the qualification, seems also to have been adopted in New Hampshire, Jarvis *vs.* Brooks, 3 Foster's New Hampshire Reports, 136; Crockett *vs.* Crain, 33 New Hampshire, 542. Chancellor Kent, vol. 3, pages 65 and 66, note, states that the rule upholds its equity and justice without the qualification. The same view is taken by Judge Gibson in his dissenting opinion in Newman *vs.* Bell, 5 Sargent & Rawle, 78, which has since been adopted as the law of Pennsylvania by Chief Justice Thompson, in Black's Appeal, 8 Wright, 507.

It is true, as stated in the opinion of Mr. Justice Strong, in the Circuit Court, that equity so far follows the law, in regarding each partner as a debtor to prior creditors, as to allow a bill to be maintained against the estate of a deceased partner without

showing that the surviving partners have no estate. And the case of Thorp *vs.* Jackson, 2 Young & Col. Exch., 553; Wilkinson *vs.* Henderson, 2 Mylne & K., 582, and Nelson *vs.* Hill, 5 Howard, 127, are so far rightly cited as sustaining him in that position. But in Thorp *vs.* Jackson, the plaintiff's relief was expressly restricted to the surplus, only after payment of private debts; and in Wilkinson *vs.* Henderson there do not appear to have been any private debts, so that the case is inapplicable here, as of course all the assets went directly to firm creditors. In Nelson *vs.* Hill, there do not appear to have been any private creditors, and the estate of the deceased partner, Gray, against which the bill was brought, was solvent. And the court's ruling is expressly in our favor on the question of distribution of funds, since the deceased having been a member of two firms, it was held that while creditors of both firms were entitled to payment, yet before payments from the estate could be made, under the decree, accounts must be taken between the respective firms of which he had been a member, and between each of those firms and their creditors. This would virtually be granting all we ask, viz., that the equities between the several classes of creditors should be considered. The case was remanded to Circuit Court for further proceedings, but the estate being solvent, no further complications arose.

The rule in bankruptcy is the same as in equity, and is in terms adopted in section 36 of the bankrupt law.

It is there enacted, "That where two or more persons who are partners in trade shall be adjudged bankrupts." * * * * "All the creditors of the company and the separate creditors of each partner shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof. And after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net

proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. And if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors. And if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy."

This section is copied almost *verbatim* from section 21, chapter 163, of the Massachusetts insolvent act of 1836.

This latter received a judicial construction in the court of last resort in that State, in the case of Howe *vs.* Lawrence, 9 Cushing, 553.

It was there decided that the exception, that where there is no joint estate or solvent partner, joint creditors may claim on a separate estate with separate creditors, was not recognized by that statute. "If there is no joint estate and no surplus of separate estate after payment of separate debts, creditors of partnership can receive no dividend."

Originally there was a different construction of these principles as to the cases of deceased and living partners.

Collyer on Partnership, sections 578–584, 920–934.

This arose from the fact that while at law the creditor had full right against all living partners, yet, against a deceased partner, his only right was in equity, which treated partnership debts as several as well as joint. Under this construction, and as the deceased partner's estate was supposed to be generally solvent, no questions for some time arose as to the order in which joint and separate debts, and it was formerly thought that in a case of a deceased partner they took *pro rata;* so Justice Hubbard said, in Sparhawk *vs.* Russell, 10 Metc., 307.

But now all distinction in this respect has been obliterated, and when a recovery is had in equity against representatives of

deceased partner, that recovery is only for surplus after payment of separate debts, following exactly the bankruptcy rule.

This was ruled by Lord Eldon, in Gray *vs.* Chiswell, 9 Ves., 118 (A. D. 1803), and was again expressly decided in Lodge *vs.* Pritchard, before referred to. 1 De Gex., J. & Sm., 610 (1863).

Lindley lays down the rule as absolutely clear. (Partnership, page 1095, ed. of 1873.)

So in Thorp *vs.* Jackson, 2 Young & Coll. Exch., 559; Hill *vs.* McRae, 9 Hare, 297; Harris *vs.* Farwille, 13 Beav., 407; Ridgway *vs.* Clare, 19 Beav., 111, and Addis *vs.* Knight, 2 Mer., 117, the joint creditors only came in on the surplus of separate estate of deceased partner *after* payment of separate creditors. In Ridgway *vs.* Clare, *supra* (1854), Sir John Romilly, M. R., lays down the rule with great clearness. He says, if one of two partners dies, his estate is administered, without distinction between joint and separate creditors—that is, supposing the surviving partner to be solvent, for then the estate of the deceased partner is allowed for payments beyond its share. If the estate of the deceased partner is *insolvent*, but the surviving partner solvent, of course the joint creditors would then proceed against the solvent partner, who would then be creditor of the estate of deceased partner for anything beyond *his* share. But if the surviving partner be insolvent, "then the joint creditors must resort in the first instance to the joint fund, and can only come against so much of the separate estate as will remain after paying the separate creditors."

And see also the Maryland case before referred to: McCulloch *vs.* Dashiell, 1 Har. & Gill, 103.

As above remarked, in bankruptcy the rule has always, except in Lord Thurlow's time, been according to our contention, and even if the rule in equity could be made out different, it would not affect our case, which must, according to rules of bankruptcy, be treated as a question of funds, but we show above that equity now follows fully the bankruptcy rule. And in a case arising under the bankrupt law of 1841, Judge Ware, sitting in United States District Court, Portland, in *Ex parte* Marwick, 8 Law Reporter, 169–171, doubted whether the terms of the United States

bankrupt law of 1841 had not adopted the English bankruptcy rule without the exception, and in that case excluded the joint creditors from separate property, although there was a merely trifling joint estate which it was claimed had been fraudulently created by separate creditors and debtors to prevent the application of the exception. And the same view under present act is taken in *Ex parte* Byrne, 1 N. B. R., 464.

The reasoning of the Circuit Court, that the provisions of the bankrupt law do not apply, because the estate of Jay Cooke, McCulloch & Co. is not being distributed under it, is certainly fallacious. The words of the act make no such exception. And the equity would certainly be rather, that if one creditor had claims on a fund not before the court or under its control, a chancellor should rather rule, more than less strongly in favor of the rights of the creditor who had no other recourse than to the fund under the control of the court, and against that creditor who had powers and opportunities for realizing his estate elsewhere.

Thus the doctrine seems clearly settled in England, that when a creditor has claims on a domestic and foreign fund, he must bring into hotch-pot all he recovers under the foreign commission before he can claim at all under the domestic.

Vide Ex parte Wilson, 7 L. R. App., 493.

Selkrig *vs.* Davis, 2 Rose, 318.

Goldsmid *vs.* Cazenove, 7 H. L. R., 785, before cited.

This would be, in fact, the true equity to administer here. If the appellees say that they are not bound by rules of bankruptcy because Jay Cooke, McCulloch & Co.'s assets are not under distribution under the bankrupt law, then let them bring in,—or being, as to these assets, a preferred creditor,—at least give credit for all that they could realize from those assets before claiming here. If they claim under the bankrupt trust, however, they must submit to the rules of distribution as if the estate of the firm which is their immediate debtor was in bankruptcy here.

It is true, as urged by appellees, that Judge Dillon expressed a different opinion *obiter In re* Downing, 3 N. B. R., 748. The

decision there we may concede to have been right in disregarding the equitable rule, because the parties in bankruptcy were the liquidating partners who had taken the assets and assumed joint debts; there was, therefore, in that case no distinction between joint and separate estates, and it was clearly shown in that case that there were no joint assets and no solvent partners, not merely no joint assets in bankruptcy for distribution, but none in existence. But the case must have been most inadequately presented, for neither in the argument nor the decision is there any reference to the late English cases, to the Massachusetts cases under the insolvent act, to the decisions under the former bankrupt act, or to Murrill *vs.* Neill, above cited, which clearly settles the case on this point.

In the case *In re* W. P. Long & Co., 9 B'kcy Reg. Reports, 227, decided by Judge Blatchford, the court distinguishes the case from *In re* Downing, but strongly intimates (page 240) that they would not, in any event, follow it as to the questions in controversy here, and cite approvingly the Massachusetts cases of Howe *vs.* Lawrence, 9 Cush., 553, and Robb *vs.* Mudge, 14 Gray, 534, in both of which the insolvent proceedings were against one partner only; also, the case of Dimon *vs.* Hazard, 32 N. Y., 65, where the Court of Appeals laid down the Massachusetts rule, and distinctly follows *In re* Downing only on the other point, viz., that the liquidating partner, having taken the assets, had assumed, individually, the firm liabilities.

In the case of *In re* Knight, 8 N. B. R., page 436, decided by Judge Drummond, the learned judge says, that there is no controversy about the rule in equity or in bankruptcy here or in England, but the case of Murrill *vs.* Neill, and the cases under previous bankrupt laws, seem not to have been cited. There, also, it is distinctly stated that there was no joint estate and no solvent partner. Such is not the case here; the contrary is directly averred in the answer. There is a large estate of the firm of Jay Cooke, McCulloch & Co. and of its solvent partners in this country, which can be reached by equity. So that as to the suggestion that this is not in the Bankruptcy Court for distribution, it would be enough to say that this proceeding is not

in bankruptcy either, but in equity, and a bill in equity could equally reach the other partners. The true analogy, therefore, is rather to the case of a bill to charge estate of deceased partner, when the order, as shown above, can only be made for surplus.

The cases of *In re* Millick, *In re* Stevens, and *In re* Freas, are explained and reconciled by reference to the opinion of Judge Brooks, in Hutchins *vs.* Lane, 11 B'kcy Reg. Rep., 463. This was a distinct case of an individual bankruptcy. There were no joint proceedings, and no joint estate was being administered, yet the joint creditor was held entitled, according to what has been shown to be the universal equity rule, only to the surplus. Of course, it is right the partnership creditor should be allowed to prove in an individual bankruptcy, although only for a surplus.

The bankrupts are in no position to complain if they should not be discharged from this debt to the United States. The same will be the case as to the other debts due by Jay Cooke, McCulloch & Co. They could take measures to have an adjudication of Jay Cooke, McCulloch & Co. also. Neither the separate creditors of Messrs. Cooke and Moorhead, or the joint creditors of Jay Cooke & Co., can take any steps to draw the assets of Jay Cooke, McCulloch & Co. into course of distribution.

And the English cases cited below show that there is no such principle as that a joint estate, to prevent operation of the equity rule, must be absolutely in the course of distribution in bankruptcy.

Robson on Bankruptcy, page 578, note *k*, &c.

After bankruptcy of one partner, his creditors cannot levy on and sell the partnership estate; but, so far as within the country where bankruptcy has been declared, the bankrupt trustee is entitled to have it come under the principles of the bankrupt law as if the whole firm were bankrupt.

Barker *vs.* Goodan, 11 Vesey, 78.

Dutton *vs.* Morrison, 17 Vesey, 193; 1 Rose, 213.

Re Wait, 1 J. & W., 585.

It is true, under English rule, joint estate is not considered to exist if it is pledged for more than its value. But this does not

apply when the creditor, holding security, is the one seeking to prove; then he must exhaust his security before coming on individual estates.

Ex parte Barclay, 1 G. & J., 272.

Robson, 612.

Further, where there has been a partnership, it is presumed there is a joint estate; but where it is doubtful, an inquiry will be ordered.

Robson, 610, 612.

Ex parte Birley, 1 M. D. & D., 387.

Ex parte Burdekin, 2 M. D. & D., 706.

Ex parte Wylie, 2 Rose, 395.

Here the answer avers that there is a large partnership estate unpledged, and what is pledged is mainly so to the appellees.

(2.) As to the rights of the United States.

We submit that the claim of the United States has priority only over the claims of other creditors of the same class—that is, over other creditors of the firm of Jay Cooke, McCulloch & Co. Under the rules of bankruptcy and equity, the United States, being creditors of the *firm* of Jay Cooke, McCulloch & Co., can only come in on the due share of Jay Cooke, McCulloch & Co., in the surplus of the separate estates of the respective partners remaining after payment of their separate creditors.

The preference of the United States is of course claimed under the fifth section of act 3d March, 1797, Statutes at Large, page 515. Under this section it has been held, in Conrad *vs.* Atlantic Insurance Company, 1 Peters, 439, that the privilege of the United States is not prior to or above the bankrupt law, but comes in under it, the trustee or assignee becoming trustee for the United States as well as for other creditors, the court saying:—"The privilege of the United States is a mere right of prior payment out of the general funds, and does not overrule the assignment as to any property the United States might, prior to the assignment, have elected to take in execution." They further held in that case that this priority did not divest

any specific or general lien, whether accompanied or not by possession.

In Brent *vs.* The Bank, 10 Peters, 596, it was repeated that the priority of claim of the United States affected no lien, general or specific, before the event took place which gave the United States priority. It was added that the United States should come in as other suitors in equity; that though they might have other powers of enforcing their priority prior to the estate coming into the hands of one holding for creditors, yet when they come in under such administration, they could only do so by complying with equitable rules, and could only claim such relief as they would be entitled to in equity and good conscience.

Further, the principle is laid down that the United States claim is not to affect any lieu, general or specific, before the event took place which gave the United States priority. Now, there can be no question that the petition in bankruptcy made an absolute transfer to then subsisting creditors of the estates of the individual partners and of Jay Cooke & Co. When did the event happen which gave to the United States priority under the act of 1797?

This priority does not arise until a suit brought or a notorious bankruptcy or insolvency has taken place. In the United States *vs.* Hoe *et al.*, 3 Cranch, 73, and Prince *vs.* Bartlett, 8 Cranch, 431, it is laid down that in case of insolvency the United States are not entitled to priority of payment, unless the insolvency be a legal and known insolvency, manifested by some notorious act of the debtor. The debtor of the United States in this case is Jay Cooke, McCulloch & Co. If that firm is insolvent, within the meaning of the decisions before referred to, such insolvency is certainly long subsequent to the transfer of the property under the rules of bankruptcy to the trustee. Under the principle of this decision, therefore, it is hard to see how the priority can be asserted.

Mr. Justice Story says:—"The right of priority of debts due Government is a prerogative of the crown well known to the common law. The claim of the United States, however, does

not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes."

United States Bank *vs.* Bank of South Carolina, 6 Peters, 35.

Chief Justice Marshall, in the case of the United States *vs.* Shelton, 1 Brock, 517, takes the view for which we here contend.

That was a case of voluntary assignments, one by the firm, the other by one partner, and the United States were creditors of the partnership.

The United States brought two bills; one claiming the priority out of the assigned estate of the partnership, and the other claiming on the assigned private estate. In deciding the case, the Chief Justice says:—

"Had a commission of bankruptcy been sued out, the debt of the United States, being a partnership debt, would have been paid out of the social fund, and recourse would not have been allowed against the private fund till the social fund was exhausted or shown to be inadequate to the satisfaction of the debt. It seems to be the dictate of justice, that partnership transactions should be charged in the first instance on partnership fund, and private transactions on the private fund, when there is not enough for the payment of all."

He then directed the trustees of the *partnership* estate "to pay the debt due to the United States, with liberty to apply to the court, should that fund prove insufficient."

It is clear that on the principle laid down in the decision of the case, that the United States in any further application could only come on the surplus of the private estates remaining after payment of the separate creditors, since the distribution of the private estate to the latter was not stopped; and the principle of the United States being obliged in the first instance to resort to the social fund is clearly established.

In the case of the United States *vs.* Hack, assignee, 8 Peters, 271, it was laid down that the preference of the United States was a preference out of its own fund only. The court decided the case directly on the principle of the difference of funds, and on the ground that it is out of the fund from which the United States

should claim that it has priority; and reading the case in connection with that of the case of Murrill *vs.* Neill, previously cited, which regards the funds as absolutely appropriated to respective classes of creditors, it seems that the converse of the doctrine of the United States *vs.* Hack would be logically deducible from it. The United States, who were creditors of one partner, relied on a Maryland statute allowing private creditors to seize and levy on part of partnership property. By this statute the property of a firm was made apparently to be held rather by tenants in common than joint tenants, and the creditors of a partner were allowed to levy on and sell any firm property not exceeding in amount the partner's interest.

So *In re* Webb *vs.* Johnson, 2 National Bankruptcy Register, page 614, a case in southern district of Ohio. Both partners in the firm had contracted an obligation to the United States as securities on a bond for a third person. It was held, however, not to be a firm debt, and the United States was not allowed to prove at all in competition with firm creditors against firm assets, and their claim to a preference refused. The court conceded that out of individual assets the United States would be entitled to a preference, and further, that if there was a surplus of partnership assets after payment of partnership debts, such surplus would go first to the United States; but held that as this was a debt of the individual partners, and the fund from partnership assets was by law appropriated to payment of partnership debts, the United States must be postponed to the partnership creditors.

So it was held in United States *vs.* Evans, Crabbe, 60, that the United States, if creditor of a partner, has no priority in distribution of firm assets in bankruptcy; and the decision is purely on the principle of the difference of funds.

In an English case, Rex *vs.* Sanderson, 1 Wightwick, 50, in which on an extent by the crown against a partner, it was held his interest in the firm subject to partnership debts was all that could be taken; that and the priority of the crown is only out of its own fund, the doctrine of different funds being again the point of the decision.

Thus, although in equity the debts be treated as joint and several, yet that does not affect the question of funds, which really must govern, since if surpluses only are in question the advantage of the joint creditor in being also a several creditor cannot be made available. And this is strongly exhibited in the case above cited of *in re* Webb *vs.* Johnson, where the partners were both debtors of the United States on a joint bond, and therefore if the principle of the nature of debts governed distribution, the United States' priority should have applied; but as it was decided on principle of funds, although the debtors were the same, the assets belonged to the creditors who had given credit on the faith of them.

The case so strongly relied on by the appellees—United States *vs.* Duncan, 4 McLean, 607—recognizes in terms the rule laid down in the United States *vs.* Hack, on which we rely, that the private estates and partnership estates constitute distinct funds on which respectively the partnership and individual creditors should come; and Judge Drummond says, (page 619,) "the true test would seem to be whether the property belonged to the firm or to the individual." We cannot see that the case of the United States *vs.* Herron, 20 Wallace, 251, makes against us or weakens our position. That case decides that the United States are not bound by the provisions of the bankrupt act as to discharge. It does not decide that they are not bound by the sections as to distribution, and expressly recognizes the twenty-eighth section, that the order for dividend does apply to the United States.

The cases we have above cited show that the priority of the United States is simply out of the general assets, and affects no equity, lien, or vested interest, and the provisions of the thirty-sixth section, as we have shown, for the distribution of the estate between partnership and individual creditors, only declares what has become the settled rule in equity between joint and separate creditors, as based upon the principle of equitable ownership in the respective funds. Whether, therefore, the provisions of the bankrupt law apply or not in this case, is not material, since if it does not apply equity will rule the case the same way. But the bankrupt law clearly does apply as to these questions, since the United States is expressly named in sections as to distribution.

VII.

Our seventh point is, "that the learned court erred in not decreeing that out of the private estates of the bankrupt partners of Jay Cooke, McCulloch & Co., private creditors were in equity entitled to be first paid, and that the surpluses of such private estates should be in equity divided *pro rata* between the firm estates of the firms of which said bankrupts had been members, and that the right of preference of the United States was restricted to the share of such surplus properly distributable to the creditors of Jay Cooke, McCulloch & Co."

The question raised by this point is that arising from the circumstance of the partners in question having been members of two insolvent firms, Jay Cooke & Co. and Jay Cooke, McCulloch & Co. What are the respective rights of the creditors of the two firms in the surplus?

Lindley lays down the rule, (Partnership, *1001,) "If the partner is a member of several bankrupt firms, the surplus of his separate estate must be divided among their respective joint estates in proportion to the amount of the debts proved against them respectively."

The leading case on this subject is *Ex parte* Francklyn, Buck, 332. There the bankrupt, whose separate estate yielded a surplus, was a member of two firms which were also in bankruptcy. The words of the order were: "The surplus of his separate estates, after paying separate creditors, to be applied to the payment of joint creditors of both firms, in proportion to the respective amount of debts proved against the joint estate of such firms respectively."

The principle seems here to be that each of two joint estates is to receive its share of the surplus according to amount of its debts, and then the distribution is to be made out of the joint estates so increased.

The doctrine laid down in *Ex parte* Francklyn is no more a rule of mere convenience in distribution than the general rule as to the rights of separate and joint creditors; but, like it, is founded in natural equity. And the language used by this

court in the case above cited of Nelson *vs.* Hill, 5 Howard, 133, seems to indicate that this principle would have been adopted as to distributions of the separate estate in that case, had the estate been ripe for distribution. As far as appears, there were there no separate creditors whatever, and the estate of the deceased partner proceeded against was solvent. It also further appeared that there were no partnership assets of either of the two firms, although the court stated ascertainment of this to be unimportant. It was held that the creditors of both firms of which Gray, the deceased partner, was a member, were entitled to come in on his estate,—a position we readily concede, since there were no separate creditors; but the court adds that, before payments are made out of this estate, accounts must be taken between the respective firms of which Gray was a partner, and between each of those firms and their creditors, thus, of course, ascertaining the amount of debts, respectively, of each firm, and bringing the case into a position where the rule in *Ex parte* Francklyn might have applied. The case was remanded to the Circuit Court for proceedings, in accordance with the opinion; but, since the estate seems to have been solvent, no further controversy, of course, arose.

Certainly it would be hard to find a place in equity for the doctrine which would take from the creditors of the firm here, who must be taken to have parted with their money in some measure on the faith of the individual estates of the partners of the bankrupt firm, their right in the surplus, in favor of creditors of a foreign firm, who could never have been practically influenced in extending credit by the existence of the individual estates.

In conclusion, we submit that the surplus of the separate estates should be divided between the firms of Jay Cooke & Co. and Jay Cooke, McCulloch & Co., in proportion to the respective debts of each firm, and that the preference of the United States can only be enforced against the shares of the surplus coming to Jay Cooke, McCulloch & Co.

R. L. ASHHURST,
J. C. BULLITT,
W. P. CLOUGH,
Of Counsel.

APPENDIX.

OPINION OF COURT.—STRONG, J.

DELIVERED OCTOBER 5TH, 1875.

The bill and answer, together with the cross-bill and answer thereto, reveal the following state of facts:—

On the twenty-fifth day of September, 1873, the London firm of Jay Cooke, McCulloch & Co. were indebted to the United States in the sum of £132,610 9s. 8d. sterling, and the debt remains unpaid. Of that firm there were at the time mentioned ten partners, three of whom are resident in London, England, and the other seven are residents in the United States. The seven resident here were also partners in the firm of Jay Cooke & Co.

On the 25th of September, 1873, a petition in bankruptcy was filed against the firm of Jay Cooke & Co., and on the 26th of November next following, the firm and its members were adjudicated bankrupts. Subsequently Edwin M. Lewis, the principal defendant, became the trustee, under the forty-third section of the bankrupt laws. There is in the hands of the trustee a large amount of assets, which belonged to the bankrupt firm, and also a large amount of cash and other property, real and personal, which was the separate property of the several partners of the firm. In view of this state of facts, the bill was originally filed. Its object is to subject the separate property of the bankrupt partners to the payment of the debt due to the United States, from Jay Cooke, McCulloch & Co., in preference to all other debts due, either by the bankrupt firm or by the individual partners, and it rests upon the assumption that as members of the London partnership, the bankrupt partners are

debtors to the United States, each being liable for the amount of the indebtedness.

The facts thus stated are substantially admitted by the answer to original bill, but it is averred that Jay Cooke, McCulloch & Co. are not bankrupts; that they have assets in this country and in England; that McCulloch, one of the partners of the firm, resident in England, has separate property in the United States; that the firm has pledged to the United States a large amount of securities and other property for the protection of the debt now claimed, and that the United States assert a right to apply these securities and other property to the payment of a debt subsequently contracted by the three non-bankrupt partners. The answer does not deny that generally the United States has a priority of claim against the estates of bankrupt debtors to it, over other creditors, but to evade the application of this acknowledged right to the present case, it presents several considerations, most of which are merely formal, requiring little notice. They are, briefly stated, thus:—

First.—That there is a large debt claimed to be due by Moorhead, one of the bankrupts, which, if valid, is sufficient to absorb all the balance of his separate estates in the hands of the trustee.

Second.—That the bill does not aver Jay Cooke, McCulloch & Co. to be insolvent.

Third.—That the balances due to the firm by the partners respectively are not stated.

Fourth.—That the bill avers no demand on the three solvent partners, nor refusal, nor inability on their part to pay the debt claimed.

Fifth.—That by a rule in equity, the private estates must first pay the private debts, and the surplus only can be applied to the firm debts.

Sixth.—That the surplus of the separate estates should be apportioned among the creditors of the several firms of which the partners were members, and that the claim of the United States can extend only to so much as the creditors of Jay Cooke, McCulloch & Co. would be entitled to out of the private estates of the partners.

Seventh.—That a declared insolvency of Jay Cooke, McCulloch & Co. is necessary to give to the United States a priority over creditors whose rights became vested by the bankruptcy.

Eighth.—That the United States have not proved their claim, and that there is no jurisdiction in this court.

Ninth.—That the remedy of the plaintiff is at law.

Tenth.—That the collaterals held by the plaintiffs should be first applied, or, if not, that the trustee should be subrogated.

Such are the defenses set up. In addition, the defendant Lewis has filed a cross-bill for the administration of the collaterals in the hands of the United States, and for an account of the assets of Jay Cooke, McCulloch & Co. In the present stage of the case, however, it is unnecessary to devote much attention to the cross-bill, or to the answer made to it, for they can have no bearing on the question we are now asked to consider. It is sufficient to say, that in the answer, the United States submits to account for the collaterals when the debt for which they were pledged shall be paid, but denies that there is any obligation to resort to the collaterals before claiming against the separate estates of the bankrupts. The answer also avers, that the securities were pledged to secure a subsequent debt due the United States, for which the bankrupts are not liable, the debt having been incurred and the pledge made after the petition in bankruptcy was filed, and before the firm was dissolved by adjudication.

There are other averments in the answer which need not now be

noticed. The cross-bill relating solely to the administration of the collaterals, cannot affect in the least the right of the United States to an immediate decree for satisfaction of the debt, out of the private estates of the bankrupts, if the trustee has only a right to subrogation or redemption, on payment of the debt for which the collaterals were pledged. And that he has no greater right is very plain. The administration of the collaterals is a subsequent matter. The present question therefore is, whether in view of the bill and answer, the plaintiffs are entitled to an immediate order for the payment of the debt due them, out of the separate estates of the bankrupts, in preference to the claims of the other creditors.

The act of Congress of March 3d, 1797, re-enacted in the Revised Statutes (sections 3466), gives priority of payment to the United States in all cases of the insolvency of the debtor. Its provisions are that "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." Now that the bankrupts who are partners in the firm of Jay Cooke, McCulloch & Co. are not only insolvent, but that they are debtors to the United States in the sum of £132,610 9s. 8d. sterling is shown by the pleadings and by the admitted facts.

True, the debt was incurred by the firm of which they were members, but it is not on that account any the less the debt of each member of the firm. The liability of members of a partnership to its creditors differs in no essential particular from that of other joint debtors. It is true the joint effects of the firm must be applied to pay the joint liabilities, for such is the legal effect of the partnership agreement. The right of a single partner extends only to an account, and to a share of what

remains after the debts have all been paid, and his separate creditors can claim execution of no more than is his. The inability of separate creditors of a partner to seize partnership property for the payment of his separate debts, has therefore no tendency to show that each member of a firm does not owe the debts due by the firm. And it is well settled by judicial decision affirmatively, that each partner is a debtor to the creditors of the firm. If he be sued at law for a firm debt, without a joinder of his copartners, he must plead the non-joinder in abatement, or the creditor will be entitled to a judgment against him individually. So if judgment be recovered against a firm, execution may be levied upon the separate estate of any of the partners. Equity also, as well as law, regards each partner as a debtor to creditors of the firm, a joint debtor with each of his copartners; and that the estate of a deceased one of several joint debtors may be proceeded against in equity without regard to the solvency of the surviving debtors is no longer to be doubted.

Thorp *vs.* Jackson, 2 Young & Collier, Exch., 553.

Numerous other decisions have been made to the same effect.

Wilkinson *vs.* Henderson, 2 Mylne & Keen, 582, was a case of partnership where a deceased partner's estate was held liable immediately for the firm debts, without averment of insolvency of the surviving partners; and the court, after pointing out that either the creditor must be required to exhaust his remedies against the survivors, or that the executors of the deceased must be required to demand the balance on settlement of the firm accounts, concluded that the latter is the sound rule. Such is also the doctrine of Nelson *vs.* Hill, 5 Howard, 127, and that asserted in Story on Partnership, 362, note 3.

And the rule is not different in bankruptcy. Creditors of a firm have been allowed, in some cases, to prove their claims against the separate estate of a bankrupt partner. Whether such creditors are permitted to share ratably with the separate creditors, or only to come upon that portion of the estate which remains ofter the separate creditors are paid, is immaterial to the present question. It is sufficient that they are allowed to prove their claims. The bankruptcy court acknowledges them

to be creditors of the bankrupt partner, though in marshalling the assets it may give priority to the separate creditors.

The case, then, as prescribed, is this:—The seven partners of the firm of Jay Cooke, McCulloch & Co., who are resident in the United States and who were also partners in the firm of Jay Cooke & Co., are severally, as well as jointly with others, indebted to the United States, and they are insolvent. The defendant Lewis has in his hands a large amount of money and other property which was the separate estate of these debtors, which he holds in trust for the payment of these debts. Why then is not the exact case before us which was contemplated by the act of Congress which gives to the United States priority of right over the claims of other creditors? The statute gives that priority without exception. It attaches to all debts due to the United States, whether they be joint or several; whether they be legal or equitable. It postpones all debts due to others, no matter what their character may be. True, the priority of the United States does not override any liens upon the debtor's property which existed before the event occurred which gives the statutory priority, that is, before the insolvency. Conrad *vs.* The Insurance Company, 1 Peters, 439; Brent *vs.* The Bank, 10 Peters, 596. The reason for this is obvious. The claim of the Government extends only to that which was the property of the debtor when he became insolvent, and his property is only that, in substance, which remains after the satisfaction of liens upon it. His power of disposition extends no further. The lien is paramount to his right. But there are no liens in this case to interfere with the priority of the United States. None are asserted. The proceeding in bankruptcy transferred the estate of the debtors to the trustee, just as it was when the act of bankruptcy was committed. Conceding that it created a trust in favor of the creditors, it is a trust for the payment of debts, and the trustee holds as well for the United States as for the other creditors. It creates no vested interests in the other creditors superior to those of the Government. On the contrary, under the statute, the trust in favor of the latter must be paramount. In Beaston *vs.* The Farmers' Bank of Delaware, 12 Peters,

102, it was decided to be the operation of the act of 1797, that whenever the debtor is divested of his property, in one of the modes stated in the act, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay the United States first out of the proceeds of the debtor's property. And the bankrupt act has wrought no difference. It has not repealed the act of 1797, and the United States are not subject to its provisions. United States *vs.* Herron, 20 Wallace, 251. Certainly, the bankrupt act has given to the creditors of a bankrupt no lien on the assigned property which can interfere with debts due to the United States. The right to priority of payment is a legal right, not a merely equitable one. It is called into existence by the bankruptcy of the debtors, but it is not created by the bankrupt act. If then there is no lien upon the property in the hands of the trustee, no lien held by or for the other creditors of the individual partners of Jay Cooke, McCulloch & Co., who are bankrupts, why must not the debt due to the United States be first paid? This question leads to a consideration of the defenses set up in the defendant's answer. They are all equitable, and, in our judgment, most of them are quite immaterial, needing no discussion. That there are other creditors of one or more of the debtors whose estate is in the trustee's hands; that the bill does not aver the insolvency of Jay Cooke, McCulloch & Co.; that it does not state the balances due to the firm by the partners respectively, nor aver any demand on the three solvent partners, or inability on their part to pay the debt due the United States; or that the claim of the United States has not been proved under the bankrupt law; none or all of these things can possibly affect the right now claimed by the plaintiffs, and they have not been urged in the argument. The defense is vested mainly upon the equity rule that in marshalling the assets of a firm, and those of the members of the firm, in case of insolvency, partnership creditors are entitled to the joint property to the exclusion of separate creditors of the partners, and separate creditors are entitled to the separate property in preference to creditors of the partnership. It is said the United States is a joint creditor, and, therefore,

that the private estates of the separate creditors of the several partners, now in the hands of the trustee must, under the rule, be applied first to the payment of the individual debts of the partners respectively. The existence of the rule in equity as well as in bankruptcy may be conceded, but for several reasons it is inapplicable to such a case as we have before us. It was introduced at first, and it is continued professedly to promote equality of distribution. But the statute giving priority to the United States is intended to prevent such equality. How then can an equity rule designed to secure equality prevail against a statute, the purpose of which is to destroy it? How can a claim preferred by an act of Congress absolutely, without exception or qualification, be postponed to the claims of other creditors by force of an equitable maxim never intended to be applicable to the case of a claimant who has a superior right by law?

If, therefore, this were a case in which the United States could be regarded as a joint creditor of the bankrupt partners claiming against the separate creditors of those partners, no court would be at liberty to deny effect to the statute. But the facts exhibited do not present such a condition of things as to enable the defendant to invoke the application of the rule independently of the statutes. The rule is applicable only where the joint estate as well as the private estates of the insolvent partner is before the court for distribution, and where there are joint creditors and also separate creditors of the individual partners. Here the two funds before the court are the joint property of Jay Cooke & Co., and the separate property of the members of the firm. Over the property of Jay Cooke, McCulloch & Co., the court has no control. The United States are not creditors of Jay Cooke & Co. They have no claim upon the joint fund within the power of the court, and they cannot be remitted to it. All they can reach of that is the individual shares of the partners in what may remain after the payment of the joint debts of that firm, if anything shall remain. If they cannot reach the private property, they can obtain nothing. If they were creditors of Jay Cooke & Co., the rule in equity might be invoked were it not for the act of Congress, and so also, if the property to be marshalled

were the joint property of the London firm, and the private property of the partners. But under the facts of the case, and in view of the unqualified provisions of the statute, we think the equity rule relied upon by the defendant has no applicability to it. Entertaining this opinion, it is unnecessary to discuss this ground of defense more at length.

That the United States are not under obligation to make use of the collaterals, and apply the proceeds thereof to the satisfaction or reduction of the debt claimed before asserting a right to the fund in the trustee's hands, is very plain. That might be their duty if they were bound by the bankrupt law, but, as we have seen, they are not. They would not be even if they had proved their debt. Harrison *vs.* Sterry, 5 Cranch, 298. And independent of the provisions of the bankrupt act, no creditor can be compelled to make use of the collaterals he may hold as a security for the debt due him before resorting directly to his debtor. This assertion is abundantly sustained by authority. The answer to the cross-bill avers that the collaterals were pledged for another debt. This indeed is not an admitted or established fact, but if it is a fact, clearly the trustee has no right to insist on a resort to the collaterals. And if it be not a fact, the utmost right he has is to subrogation after the debt is paid. Even a surety cannot compel the creditor to resort in the first instance to the estate of his principal. He has no right in equity until he has himself performed equity by paying the debt. The bankrupt partners in this case are not even sureties. They are principal debtors. What a surety cannot do is certainly beyond their power, and if they cannot require the United States to sell the collaterals before payment of the debts, or to resort primarily to their co-debtors, the solvent partners of Jay Cooke, McCulloch & Co., surely their trustee cannot.

There is then nothing in any principal of equity, or rule in bankruptcy, that affects the right of the United States to priority of payment of the debt due them out of the private estates of the bankrupts in the hands of the trustee, and a decree will be made accordingly.

Let a decree be prepared declaring that the United States are

entitled to be paid out of the property in the hands of the trustee, belonging to the private estates of those partners of the firm of Jay Cooke, McCulloch & Co., who have been adjudicated bankrupts, the amount due by the said firm to the plaintiffs on the day the petition in bankruptcy was filed in preference to other creditors, and declaring also that the United States are not required to exhaust their rights in the securities pledged to them before they are thus entitled.

And the right of the plaintiffs to apply for further relief in accordance with the prayer of their bill, without prejudice by reason of this decree, is reserved.

And all questions respecting the right of the defendant to subrogation hereafter, and respecting the administration of the securities in the hands of the United States, as also the right to an account, are likewise reserved for future adjudication.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

No.....

EDWIN M. LEWIS, TRUSTEE IN BANKRUPTCY OF JAY COOKE & CO., APPELLANT,

against

THE UNITED STATES OF AMERICA, RESPONDENT.

ARGUMENT

SUBMITTED ON BEHALF OF DeGRAFF & CO., CLAIMANTS AGAINST THE SEPARATE ESTATE OF WM. G. MOORHEAD, ONE OF THE BANKRUPTS.

W. P. CLOUGH,

Of Counsel for DeGraff & Co.

IN THE SUPREME COURT of the UNITED STATES,

EDWIN M. LEWIS, TRUSTEE IN BANKRUPTCY OF JAY COOKE & Co.,
Appellant,
against
THE UNITED STATES OF AMERICA,
Respondent.

STATEMENT OF THE CASE.

For some years prior to September 18, 1873, the firm of JAY COOKE & Co., a copartnership composed of *eight* persons, namely: *Jay Cooke, Wm. G. Moorhead, Henry D. Cooke, Harris C. Fahnestock, Pitt Cooke, George C. Thomas, James A. Garland, and Jay Cooke, Jr.*—all citizens of the United States; and residents therein—carried on business as bankers in the cities of New York and Philadelphia.

During several of the latter years of the same period, *another* firm, JAY COOKE, MCCULLOUGH & Co., a copartnership composed of *ten* persons, being *seven* of the *eight* partners of JAY COOKE & Co., namely: *Jay Cooke, Wm. G. Moorhead, Henry D. Cooke, H. C. Fahnestock, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr.*, and of *three other persons*, namely: *Hugh McCullough*, a citizen of the United States, temporarily residing in England, and *Frank H. Evans* and *J. H. Puleston*, British subjects, and residing in England, carried on business as bankers in the city of London.

Jay Cooke, McCullough & Co., were bankers of the Navy Department of the United States Government, in London;

and, at the date above mentioned, that department had deposits in the hands of that firm, to the amount of about $500,000 in gold coin.

Some time prior to September 18, 1873, the firm of JAY COOKE & Co. had become insolvent; and on that day that firm closed the doors of its banking houses, and publicly declared its insolvency.

On September 25, 1873, a petition in bankruptcy was filed in the District Court of the United States, for the Eastern District of Pennsylvania, against the latter named firm, by *firm* creditors; which resulted in an adjudication of the bankruptcy of the firm by that court, sometime in the month of *November*, 1873.

Upon the adjudication of bankruptcy, the appellant, Edwin M. Lewis, was appointed by the Bankruptcy Court, the *Receiver* of the joint and separate estates of the bankrupts; and on February 6, 1874, he was chosen and constituted *Trustee* of those estates; in which capacity he is still acting.

At the time of the failure of JAY COOKE & Co., the firm of JAY COOKE, MCCULLOUGH & Co., had, within the United States, a large amount of property, consisting of railroad iron and securities, and of a large balance of indebtedness due them from the former named firm.

After the failure of JAY COOKE & Co., *and after the filing of the petition in bankruptcy* against that firm, the solvent partners of JAY COOKE, MCCULLOUGH & Co., assuming to act for their firm, turned over to the Secretary of the Navy, for the Government of the United States, all the property referred to, as security for the re-payment to the United States of the deposits of the Navy Department; which property has ever since remained within the United States, and been held by the government thereof as security for the re-payment of its deposits.

Each of the bankrupts, at the time of the adjudication of bankruptcy, owned property in his *separate* and *individual* right; all of which passed to the trustee.

The separate estates of *Jay Cooke* and of *Wm. G. Moorhead*, respectively, were of great value.

The firm of JAY COOKE, MCCULLOUGH & Co., *as a firm, and three of the partners, of that firm, as individuals, namely, McCullough, Evans and Puleston, have always remained solvent.*

Furthermore, no legal proceedings have ever been taken on behalf of the Government against that firm, or against any of the solvent members thereof, to enforce the re-payment of its deposit.

In the fore part of the year 1875, a bill in equity was filed in the name of the United States, in the Circuit Court of the United States for the Eastern District of Pennsylvania, against Lewis, the Trustee, seeking to have that Court declare that the United States were entitled to have the amount of their deposits with the firm of JAY COOKE, MCCULLOUGH & Co., repaid to them out of the SEPARATE ESTATES of the *seven* bankrupts who had been partners in that firm; and, further, that the United States were entitled to PRIORITY in the payment of such indebtedness out of such separate estates, over all other creditors, either of the firm of JAY COOKE & Co., or of the bankrupts individually.

The bill did not, however, state that any demand had ever been made upon JAY COOKE, MCCULLOUGH & Co., *for the debt, nor that that firm is not fully able to pay the same upon demand.*

The trustee filed his answer, admitting the indebtedness of JAY COOKE, MCCULLOUGH & Co., to the United States, substantially as averred in the bill; that the seven bankrupts above specified, had been partners in that firm; and that he had in his hands a large amount of money and property belonging to the separate estates of those bankrupts respectively.

As defences against the relief prayed by the bill, the answer stated, among other things, that debts had been proven against the separate estates in question to a large amount, by individual creditors of the bankrupts; that the United States

had received and then held the securities before mentioned; that the firm of JAY COOKE, MCCULLOUGH & Co., as a firm, and three of the partners thereof, as individuals, had always remained solvent; and that that firm, and one or more of the partners thereof, had property to a large amount within the United States. And the answer insisted, among other things, that the Government is not entitled to any priority in the payment of its debt out of the separate estates of the bankrupts, over the separate creditors of the bankrupts; but that, on the contrary, such separate estates must be distributed in accordance with the provisions of the bankruptcy act, now in force, whereby the separate estates of bankrupt partners of a firm, are made assets for the payment of the separate creditors of such partners, only, until all such creditors are paid in full; and further insisted, that, in any event, the Government must, before it could come in against the separate estates of the bankrupts, have deducted from its claim the value of the securities belonging to the firm of JAY COOKE, MCCULLOUGH & Co., which had been placed in its hands.

No replication was filed; and the cause was set down for hearing upon bill and answer.

The cause was argued before the Circuit and District Judges, and afterwards, at the instance of the Government, before the Justice of this Court assigned to the Third Circuit, sitting with the Circuit Judge.

A decree was rendered by the Court, declaring the right of the United States to priority over all other creditors of the bankrupts, in the payment of their debt out of the separate estates of the bankrupts; and further declaring that the United States were not, in the first instance, obliged to have the value of their firm securities deducted from the amount of their debt, and to come against the separate estates for the balance thereof only after the making of such deduction.

But the decree expressly reserved the rights of all parties in the collaterals, after the indebtedness of the United States should be satisfied, for further consideration.

To reverse that decree, this appeal was instituted.

De Graff & Co., on whose behalf this argument is presented, are claimants against the separate estate of Wm. G. Moorhead, to the amount of more than $500,000.

Assignment of Errors.

The court erred in not deciding:

1. *That the separate estate of each of the bankrupt partners of* Jay Cooke, McCullough & Co., *must be appropriated to pay his separate creditors; that only the balance of his separate estate, after the payment of his separate indebtedness, can be appropriated to the payment of the debt of any firm whereof he may have been a partner; and that the right of priority in the United States is limited to such balance.*

2. *That the United States cannot come against the separate estates of the bankrupt partners of* Jay Cooke, McCullough & Co., *for anything more than the balance left remaining after the value of all securities placed by that firm in the hands of the United States, has been deducted from their debt.*

Points and Authorities.

As but *seven* of the *ten* partners composing the firm of Jay Cooke, McCullough & Co., are in bankruptcy, the separate estates of the bankrupt partners of that firm must be regarded, so far as firm creditors of Jay Cooke, McCullough & Co. are concerned, in the same light as if such partners had been put into bankruptcy separately, and as if the firm of Jay Cooke & Co. had never been put into bankruptcy.

For all the purposes of this case, Jay Cooke, Wm. G. Moorhead, Henry D. Cooke, H. C. Fahnestock, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr., are to be considered as individually and separately in bankruptcy; and the bankruptcy of the firm of Jay Cooke & Co., as a firm, is to be left out of view.

The rights of the United States upon the estate of any one of the seven bankrupt partners of Jay Cooke, McCullough &

Co. are no greater than they would be if such partner was alone bankrupt.

The errors above assigned, will be discussed in the order in which they have been set forth.

I.

THE FIRST PROPOSITION TO BE CONSIDERED IS: WHAT RIGHTS OF PRIORITY OVER OTHER CREDITORS, HAVE THE UNITED STATES, IN RESPECT TO THEIR DEBT, UPON THE SEPARATE ESTATES OF THE BANKRUPTS?

Are the United States entitled to the priority of payment which they here set up?

If they are entitled to it, the right must arise by virtue of some *statute*, conferring it in express terms, or by necessary implication.

The English crown has a *prerogative*, that when the *process of extent* is issued against the property of a crown debtor, to enforce the payment of the debt, the extent has priority over *unexecuted* process against the same property, sued out by private creditors.

The United States have never claimed such a right of precedence; nor has any State ever claimed it, unless by virtue of some legislative act conferring it. The right of the English crown to this precedence, is founded upon the principle that in cases where the rights of the crown and the rights of its subjects come in conflict, or even meet, the rights of the crown take precedence, and those of the subject must yield.

Such a principle has never been deemed to obtain in this country, as part of the unwritten law; and no traces of it, or of its consequences, are to be found outside of the statute books.

It is a principle *local* in its nature to Great Britain, and not one which has ever been looked upon as having been brought to this country as part of the common law.

The only statutes giving to the United States a priority of payment over other creditors of its debtors are:

1. The act of 1797 for the adjustment of accounts, *Sec.* 5.
2. The act of 1799 for the collection of duties, *Sec.* 65.
3. The present bankruptcy act, *Sec.* 28. *Rev. Stats., Sec.* 5,101.

The act of 1799 is confined in its operation to cases of indebtedness arising upon bonds given to the United States for the payment of duties, and, therefore, has no application to the case at bar.

Sec. 5 of the act of 1797 is in these words:

Where any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators, shall be insufficient to pay all the debts from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed.

Sec. 5,101 of the Revised Statutes reads as follows:

In the order for a dividend, the following claims shall be entitled to a priority, and to be first paid in full, in the following order:

First.—The fees, costs and expenses of suits, and of the several proceedings in bankruptcy under this title, and for the custody of property, as herein provided.

Second.—All debts due to the United States, and all taxes and assessments made under the laws thereof.

Third.—All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments under the laws thereof.

Fourth.—Wages due to any operative, clerk or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth.—All debts due to any persons who by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this title had not been adopted. But nothing contained in this title shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

These statutes do not give to the United States a priority over the separate creditors of the bankrupt partners of Jay Cooke, McCullough & Co., upon the separate estates of such partners.

FIRST.

This case is not one which falls within the scope of the act of 1797.

If that act were the only one giving to the United States a priority in cases arising under the present bankruptcy law, the United States would have no priority in this case, even over the *firm* creditors of Jay Cooke, McCullough & Co.

The force and application of section 5 of the act of 1797 have been thoroughly settled by numerous decisions of both the federal and state courts.

First.—The statute does not confer upon the government any *lien* upon the debtor's property.

The government cannot, therefore, by seizure of its debtor's property under process of court, acquire any advantage which it could not get had not the act been passed.

Second.—The priority arises only in cases where *all* the debtor's property has been divested out of him, either by death, or by bankruptcy, or by insolvency, or by attachment of his effects as those of a concealed or absconding debtor, or by voluntary assignment for benefit of creditors.

The test to determine whether or not the statute is applicable to any given case, is the fact whether or not the debtor's entire property has passed out of him. If any part of the debtor's property be left remaining in him, the act of 1797 does not apply, and the government has no priority, although the debtor may be wholly unable to pay his debts, and although judgments may be recovered against him, and his property be seized under process issued thereon.

And it devolves upon the government, wherever it claims priority over other creditors, to show that the debtor has been divested of all his property in one of the modes mentioned in the act.

Third.—The priority of the United States under the act does not arise until the divestiture of the debtor's property has taken place. It does not, therefore, interfere with the passage of the property from the debtor.

Fourth.—The statute operates merely as a *rule of distribution.* It does nothing more than to confer upon the government the right, when the assets set apart by the law for the payment of the unsecured debts of those persons of whom the United States are creditor, are distributed, to be first paid in full out of such assets.

Prince vs. Bartlett, 8 *Cranch*, 431; *U. S. vs. Howland*, 4 *Wheat.*, 108; *Conard vs. At. Ins. Co.*, 1 *Pet.*, 386.

An examination of these and other cases upon the force of the act of 1797, shows that the case at bar is clearly and strongly outside that act.

The debtor of the United States in this case is not insolvent, within the meaning of that statute.

Joint estate of the firm of Jay Cooke, McCullough & Co. exists both in this country and in England, and there remain three solvent partners of that firm, one of whom is a citizen of the United States.

The separate partners of Jay Cooke, McCullough & Co. are not the "person" indebted to the government, within the intent of the statute. The *firm itself* is the debtor. But the firm is neither in insolvency nor in bankruptcy. There is nothing in the bill even to indicate that the firm is unable or unwilling to pay all its debts, dollar for dollar, upon demand. And this suit is not a demand for payment upon the firm. It is not claimed that the trustee of Jay Cooke & Co. has in his custody any of the funds or property of Jay Cooke, McCullough & Co., and payment out of the funds of the latter firm is not sought in this suit.

When the expression, "debtor," or "person owing debts' or any equivalent expression, is used in laws relating to bankrupt and insolvent debtors, the expression relates to the

entire copartnership, when the debt is owed by a copartnership.

The truth of this proposition finds the best exemplification in the English bankruptcy acts; for the point has most frequently arisen under those acts.

Thus, all the English bankruptcy acts, from the earliest periods, have empowered, in general terms, all creditors of a bankrupt to prove their debts; and to vote for assignees; and to share equally in the distribution of the debtor's estate.

Yet even the Chancellors, looking at the question with all the breadth of vision of equity judges, have uniformly held that this general authority to creditors did not authorize the creditor of a co-partnership to prove his debt against the separate estate of one of the partners thereof separatly in bankruptcy.

Hence, until the consolidation and revision of the bankruptcy acts by the act of 6 *Geo. IV.* (A. D. 1824,) a copartnership creditor could not prove his debt under a separate commission against one of the partners, without an express appeal to the equitable jurisdiction of the Lord Chancellor; and even when he had thus proven his debt, he could not vote for assignees.

And the reason given was, that co-partnership creditors were not creditors, within the meaning of the bankruptcy act, of the separate partners.

Exp. Parr., 18 *Vesey*, 65.

Exp. Langman, do., 71.

See also cases hereinafter cited.

A firm composed of several partners cannot be deemed insolvent for any purpose, unless the firm itself, as a firm, is insolvent.

The individual insolvency of some of the partners of a firm does not make the firm itself insolvent, even in a commercial sense.

Sec. 39 of the present bankruptcy law of the United States declares that certain acts committed by a debtor while insolvent shall be acts of bankruptcy.

But, if the debtor be a copartnership, the inability to pay

debts must extend to the firm itself, and not merely to some of the partners individually, in order that the act shall amount to an act of bankruptcy.

Parker vs. Phillips, 2 *Cush.*, 175; *Hanson vs. Paige*, 3 *Gray*. 239.

If a petition for adjudication of bankruptcy should be filed against the firm of Jay Cooke, McCullough & Co., setting forth as an act of bankruptcy that that firm being insolvent, had made payments to certain of its creditors by way of fraudulent preference, proof of the facts set forth in the bill in this case would not prove the insolvency of the firm ; and a petition in bankruptcy founded upon such facts as constituting insolvency on the part of the firm could not be sustained.

Yet, the bankruptcy act does not mention partnerships in the section declaring what acts shall be deemed acts of bankruptcy. That section merely provides that "*any person*" committing the acts named in the section, while in a state of insolvency, shall be adjudged bankrupt. But in cases of copartnerships, it follows, as a matter of plain legal construction, that the state of inability to pay debts must extend to the firm as such, and that the act of bankruptcy must be committed by the firm as such.

The construction thus plainly belonging to section 39 of the bankruptcy act, affords a complete guide for the construction of sec. 5 of the act of 1797, in cases where the debtor of the United States is a copartnership composed of several members.

The latter statute, like the former, speaks of the debtor in the singular number—refers to him as a "*person*" owing a debt.

If the term *person*, as used in the former statute, means the entire firm, when the debtor is a copartnership, that term, as used in the latter statute, must mean the same thing, when applied to a debtor of the same description.

If the individual insolvency of some of the partners of Jay Cooke, McCollough & Co. could not constitute an insolvency of the debtor of the government, within the meaning of sec.

39 of the bankruptcy act, it could not constitute an insolvency of the debtor of the government within the meaning of the act of 1797.

If such were not the case, then this strange result would follow: Where a member of a copartnership indebted to the United States should become separately insolvent, the United States could not put him into bankruptcy, so as to secure the right of priority of payment of their debt out of his assets; but, in case his separate creditors should see fit to put him into bankruptcy, then the United States could claim their right of priority.

The construction most favorable to the government which the act of 1797 will bear is, that when a copartnership is debtor, a case of insolvency within the intent of the act exists only when the firm, *as a firm*, has been divested of all its property by one of the modes designated in the act. The intent of Congress clearly was, that the statute should only apply to cases where the government should be unable to proceed against the property of its debtor by ordinary process of court. Congress did not mean the statute to apply to cases where the government should be able to proceed by personal action against the debtor, and to seize property of the debtor under execution.

It is perfectly well settled that where the debtor is a single individual, the act of 1797 does not apply so long as the smallest amount of his property remains in him, provided there be no express design to evade the act. It would be most singular, therefore, if, in the case of a copartnership, where there remain solvent partners and a joint estate, the bankruptcy or legal insolvency of some of the partners individually could call the statute into operation.

And no construction more favorable to the government than the one suggested, has ever been put upon the act by the courts. The very point has been passed upon by Chief Justice Marshall; and the conclusion reached was in accordance with the views herein expressed.

U. S. vs. Shelton, 1 *Brock.*, 517.

In this case, the facts were these:

P. T. Shelton and Walter Shelton, copartners in business, owing in their copartnership capacity a large amount of indebtedness, a debt to the United States among the rest, made an assignment of their partnership property for the benefit of their firm creditors.

Walter Shelton, about the same time made an assignment to the same assignee, of his *separate* estate, for benefit of his *separate* creditors.

P. T. Shelton did not make an assignment of his separate property.

The United States commenced this suit to enforce a priority of payment of its debt out of the assigned property in the hands of the assignee.

It was insisted, in defence, that because P. T. Shelton had not assigned his separate property, there did not exist in the case such a complete state of insolvency as was contemplated by the act of 1797. But Ch. J. Marshall ruled, that the debtor of the Government was the *firm, as a firm;* and that the *copartnership* having made an assignment of all its joint effects, the person owing the United States had become insolvent within the meaning of the act.

Nor is any stronger construction of the statute in favor of the government at all essential to the full protection of its interests.

Where a copartnership is the debtor of the United States, of what advantage could it be to the government to pursue a remedy for the collection of its debt against an individual member of the firm, so long as the firm itself, as a firm, should remain solvent?

Such a construction of the act as is here contended for in the name of the United States, might enable those intrusted with the powers of government to be of great service to their friends; but it is impossible to see how the interests of the government itself, or of the public which it represents, could be very materially advanced thereby. For instance, such a construction of the statute would enable the Secretary of the Navy, if he should feel disposed to do so, to save

the firm of JAY COOKE, MCCULLOUGH & Co., and particularly the solvent partners of that concern, from the very considerable inconvenience of having to pay back to the Government its moneys which they have in their hands; but how the Government or the people of the United States could be advantaged by the doing of such an immense service to those gentlemen, at the expense of American citizens, who are the separate creditors of Moorhead and of the other bankrupts, it is impossible to understand.

The residence of some of the partners of a firm in a foreign country—at least in a country where an enlightened system of jurisprudence obtains; where the rights of all persons are amply protected by the laws; and where efficient courts of justice are constantly open to the Government of the United States to enforce the payment of its demands against any and all of its debtors within the jurisdiction—cannot make the act apply to cases to which it otherwise would not apply. The act is silent concerning the residence of the debtor, and the existence of the priority is wholly independent of the question whether the persons owing the debt reside within the United States or abroad. The residence of a debtor of the government in a foreign country cannot prevent its right of priority from arising; and, on the other hand, such residence cannot bring that right into existence, in cases where it could not exist if all the debtors were resident in this country.

However, if a copartnership should have its business located, and some of its members should reside in a foreign country, not provided with proper judicial machinery to enforce the payment of debts; or in which the courts should, for any reason, as for instance, on account of hostilities existing between the government thereof and the United States, not be freely open to the United States, in such cases, an exception to the rule might properly be introduced.

But, in cases where no such obstruction to the collection by the Government of its demands exists, there seems to be no reason why the fact that some of the members of a

copartnership indebted to the United States reside abroad, and the copartnership business is located there, should make the application of the act of 1797 to such indebtedness any different from what it would be, if all the partners should reside in this country.

SECOND.

The bankruptcy act does not give to the government the priority which it claims.

Section 28—that quoted above from the Revised Statutes—it is true, provides that in the dividend certain classes of demands, of which those due to the United States form one, shall have a priority over other demands.

But this section does not say what shall be deemed *assets* of the bankrupt, to be divided among his creditors in the way it points out. Other parts of the act are devoted to saying what shall be assets for payment of the bankrupt's debts in any particular case.

Section 36 is devoted to defining what shall be assets for payment of the debts of a copartnership, and what shall be assets for payment of the separate debts of any individual member of such copartnership.

That section, (*Sec, of the Revised Statutes*) is in the following terms:

And be it further enacted, That where two or more persons, who are partners in trade, shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted.

And all the creditors of the company and the separate creditors of such partner, shall be allowed to prove their respective debts.

And the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof.

And after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. And if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors, and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been, if the partnership had been dissolved without any bankruptcy.

And the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts.

And the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be, if the proceedings had been against him alone under this act.

And in all other respects, the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one partner alone.

The rule embodied in this section is not one of the mere *order of distribution.*

It is, on the contrary, a rule of *assets.*

This distinction is important to be borne in mind; for upon it, hinge many of the most important questions arising out of bankruptcy proceedings.

The *general* creditors of an insolvent debtor, have no *lien* upon his property; and no interest therein which the law regards as valuable. Hence, when under bankruptcy statutes the property of such a debtor is all taken from him, and put into the hands of the officers of the law, nothing is taken away from any *general* creditor of the bankrupt, which such creditor has any right to call his own. And whatever rights in the distribution of such property any general creditor may have, he must derive exclusively from the statutes under which the property is taken from the debtor.

The rights of the general creditors of a bankrupt, being wholly the offspring of the bankruptcy act under which the proceedings are prosecuted, those rights, from the neces-

sity of the thing itself, find their measure in the provisions of such act.

A general creditor of a bankrupt has precisely such rights in the property taken from the bankrupt, as the statute says he may have therein, and nothing whatever in addition thereto.

Hence, one essential feature of every bankruptcy statute is a direction how the property taken from the bankrupt by the proceedings shall be disposed of. The statute must say who shall be entitled to share in the distribution of it. And, generally, it becomes necessary, or at least just and politic, to set apart specific portions of the property for distribution among particular classes of creditors. Statutes which thus provide, do not wrong creditors of other classes than those for whom such specific portions of property are thus set apart; for, as before remarked, the general creditors having no rights in the property of the bankrupt, when it is taken from him, must be content to receive such distributive share thereof as the government, which is administering the proceedings, has seen fit to allow to them.

Section 36 of the present bankruptcy act, is one which *has* for its chief objects the devotion of specific portions of the property of bankrupts to the payment of particular classes of creditors. The section limits the assets for the payment of firm debts to two funds:

First.—The *firm* property.

Second.—The *remnants* of the *separate* properties, after the separate creditors have been paid.

By that section, the separate estates considered as *entireties* are not assets for payment of firm debts. As *entireties*, the separate estates are made assets only for the payment of separate debts.

Merely the *remnants* of the separate estates left after payment of the separate debts of the respective partners, are what the section makes assets for the payment of firm debts, or permits to be used for that purpose.

The distinction between provisions of the character of those contained in section 36 of the bankruptcy act, and pro-

visions of the character of those contained in section 28 of the same act, is broad and unmistakeable.

The provisions of section 28 merely direct in what order the assets devoted by the provisions of section 36 to the payment of firm debts, and to the payment of separate debts, shall be distributed among the creditors of the firm, and among the creditors of the individual copartners, respectively. The firm property is devoted, by section 36, to payment of all firm creditors, firstly, those preferred, in the order of priority, and lastly, those having no preference rateably.

So, on the other hand, the separate property of each copartner is devoted, by the same section, to the payment of all his separate creditors; firstly, those preferred in the order of priority; and lastly, those having no preference, rateably.

The rule laid down in section 36 is not subject to exceptions which will, in any case, permit joint creditors to come in upon the separate estates. as entireties, that is to say, until the separate creditors have been paid in full.

The principle embodied in the section is very old; and would have existed as well without express enactment in the bankruptcy law as it now does with it.

In England, the rule that in bankruptcy, joint property of a partnership is assets for the payment of firm debts, and separate property of individual partners is assets for the payment of separate debts of such partners, has been enforced by the Chancellors, with the exception of a few years under Lord Thurlow, since the beginning of the 18th century.

The following are some of the many reported cases in which the rule has been acted upon:

Ex parte Crowder, 2 *Vernon, case*, 628.
Twiss vs. Massey, 1 *Atkyns*, 67.
Ex parte Cooke, 2 *Peere W.*, 500.
Ex parte Elton, 3 *Vesey*, 240.
Ex parte Abell, 4 *do.* 837.
Ex parte Ruffin, 6 *do.* 119.
Ex parte Clay, 6 *do.* 113.
Ex parte Chandler, 9 *do.* 35.

Barker vs. Goodair, 11 *do.* 85.
Ex parte Kensington, 14 *do.* 447.
Ex parte Kendall, *do. do.* 447.
Ex parte Sadler & Jackson, 15 *do.* 52.
Ex parte Taitt, 16 *do.* 193.
Dutton vs. Morrison, 17 *do.* 193.
Ex parte Wilson, 18 *do.* 449.
Lodge vs. Prichard, 1 *D. J. & S.*, 610.
Ex parte Melbourne, 6 *L. R. Ch. App.*, 832.

The same rule has always been in force in the United States.

Murril vs. Neil, 8 *How.*, 417.

In the English law, three exceptions to the rule have commonly been recognized:

First.—Where a joint creditor sues out a separate commission; (a thing expressly permitted to be done by the English bankruptcy acts, but which is not authorized by the present bankruptcy act of the United States.)

Second.—Where there is no solvent partner and no joint estate.

Third.—Where there are no separate creditors, or where the joint creditors will undertake to pay the separate creditors in full.

The first of these exceptions has never been recognized in this country. The second of them has probably never existed here.

Murril vs. Neil, 8 *How.*, 417.

The third exception is of uo *practical* importance, but its existence as an exception conclusively proves that the rule to which it is annexed, namely, that copartnership property is to be devoted to payment of copartnership debts, and separate property is to be devoted to payment of separate debts, is a rule of *assets*, and not a rule merely of the order of *distribution*.

The effect of the second exception is such that the most trifling joint estate will prevent its application.

Ex parte Leaf, 1 *Deacon*, 176.
In re Lee & Armstrong, 2 *Rose*, 54.

Ex parte Kennedy, D. M. & G., 228.

Ex parte Clay, do. do. note.

And it is not necessary that any of the joint estate shall have actually come into the hand of the assignee.

If it exists in such form and place that it may be reached without undue delay or expense, either by the firm creditors, ~~and~~ applied toward payment of their debts by legal process, or by the assignee for distribution under the bankruptcy act, it is sufficient to prevent the firm creditors from coming upon the separate estates of the partner. No judgment or dictum has ever insisted upon any different rule.

And if a partnership have once existed, the existence of a joint estate will be presumed.

Robson on Bky, (ed. of 1872,) *p.* 612.

Ex parte Birley, 1 *Mont. D. & D.*, 387.

Ex parte Birdiskin, 2 *do.*, 704.

Ex parte Wylie, 2 *Rose*, 395.

So, if any member of the firm have not been adjudged bankrupt or insolvent, although he may be unable to pay his debts, the exception will not apply.

Eden on Bank., 229.

3 *Madd.*, 229.

But, whether or not, as a principle of unwritten law, the second exception to the general rule has ever been in force here, it is not in force in cases arising under the present bankruptcy act; because the operation of section 36 of that act is such as to exclude the existence of any exception whatever to the general rule which it embodies. The section in question, like most other parts of the act, whereof it forms part, was copied from the Massachusetts Insolvent Act of 1838, which has ever since remained in force in that State, except while suspended by the bankruptcy laws of the United States of 1841 and 1867.

Section 21, of the Massachusetts statute, as carried into the compilation of the statutes of that State of 1860, as sections 108, 109 and 110, of the chapter ~~of the revision~~ relating to insolvent debtors, was as follows:

When two or more persons who are partners become insolvent, a warrant may be issued as provided in this chapter by the judge in whose county either of the partners reside, upon the petition of one or more of the partners, (reasonable notice being first given by the judge to the other partners, if within the State, to show cause why its prayer should not be granted,) or upon the petition of any creditor of the partners, upon which warrant all the joint stock and property of the company, and the separate estate of each of the partners shall be taken, except such parts as may be by law exempt from attachment, and all the creditors of the company, and the separate creditors of each partner, may have their respective debts.

The assignee shall be chosen by the creditors of the company, and shall keep separate accounts of the joint stock or property of the company, and the separate estate of each member thereof; and after deducting out of the whole amount received by him, the total expense and disbursements paid, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors.

If there is any balance of the separate estate of a partner, after payment of his separate debts, it shall be added to the joint stock for the payment of the joint creditors. If there is a balance of the joint stock after the payment of the joint debts, it shall be divided and appropriated to and among the separate estates of the several partners according to their respective rights and interests therein, as it would have been if the partnership had been dissolved without insolvency; and the sums so appropriated to the separate estate of each partner, shall be applied to the payment of his separate debts.

The certificate of discharge shall be granted or refused to each partner, as it would or ought to be, if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the same manner as a single person.

Long prior to the passage of the bankruptcy act of 1867, these provisions of statute had been construed by the Supreme Court of Massachusetts, and their effect completely settled.

The interpretation put upon them by the Court was, that

in no case could joint debtors come upon separate property before satisfaction of the separate debts.

Howe vs. Lawrence, 9 *Cush.*, 553.
Somerset Potter Works vs. Minot, 10 *do.*, 592.
Catskill Bank vs. Hooker, 5 *Gray*, 574.
Ex parte Weston, 12 *Met.*, 1.
Robb vs. Mudge, 14 *Gray*, 534.
Wild vs. Dean, 3 *Allen*, 579.

It is a leading rule of statutory construction, that where a statute of any government that has received a judicial interpretation is adopted by another government, the interpretation is to be considered as adopted also, unless the legislature plainly express a different intention.

Potter's Dwarris on Stats., 274, *note* 4.
Tucker vs. Oxley, 5 *Cranch*, 34, (42.)
Comm. vs. Hartwell, 3 *Gray*, 450.

The bankruptcy act of the United States embodies no new or original principle.

The system introduced by that act into the federal jurisprudence, instead of being something novel; something invented by Congress; was a completely finished, and thoroughly ascertained, thing, down even to the smallest detail.

Congress went to the Insolvent Act of Massachusetts for most of the *language* of the statute which it adopted; but it found in that act no new *principle* of much importance. The Legislature of the State of Massachusetts had borrowed all the matters of principle embodied in its Insolvent Act, from the bankruptcy statutes of England, where they had been in force, and in extensive practical operation, for a century and a half before.

The only important modification of the principles of the English bankruptcy acts introduced by the Massachusetts Insolvent Act, was the abolition of all exceptions to the general rule, that firm property is assets for firm debts, and the separate property of partners is assets for the separate debts of such partners.

But even this modification of the principles of the English system, slight and unimportant as it is, was not original with the Legislature of Massachusetts; for as was stated by this court in the case of *Murril vs. Neil*, cited above; the exceptions thus swept away by the insolvent act of that State have never obtained in this country; but the rule has always been in force here without qualification.

Long before the passage by Congress of the present bankruptcy act, every question of principle; every question relating to the collection and distribution of the bankrupt's property among his creditors; and to the rights of creditors to share in the bankrupt's estate, that could arise out of that act, had been completely settled and put at rest by a long line of decisions by the English courts, or by the courts of the State of Massachusetts.

Hence, under the rule of statutory construction above stated, and which was laid down by the court in respect to the bankruptcy act of Congress of 1800, with so much strength and clearness, in the case of *Tucker vs. Oxley*, the decision of the English Chancellors, and particularly the decisions of the Supreme Court of the State of Massachusetts, which have been cited, are no less binding upon the courts of the United States, when called upon to construe the various provisions of the bankruptcy act, than the letter of those provisions themselves.

As the Supreme Court of the State of Massachusetts had, long before the adoption of the present bankruptcy act of Congress, by a lengthy series of ably and thoroughly considered cases, given a construction to those parts of the insolvent act of that State, from which section 36 of the bankruptcy act was copied by Congress, that construction must be deemed to have been adopted by Congress; and the courts are not now at liberty to reject it, and in its stead to put upon those provisions of statute new constructions of their own.

The rule in respect to the distribution of joint and separate estates, even under the English bankruptcy acts, is no

different when the bankruptcy is of one or more partners separately from what it is when the entire firm is in bankruptcy.

Ex parte Baudier, 1 *Atkyns*, 98.
Ex parte Elton, 3 *Vesey*, 238.
Ex parte Abell, 4 *do.* 837.
Ex parte Clay, 6 *do.* 113.
Ex parte Ruffin, 6 *do.* 119.
Ex parte Chandler, 9 *do.* 35.
Barker vs. Goodair, 11 *do.* 85.
Ex parte Kensington, 14 *do.* 447.
Ex parte Sadler & Jackson, 15 *Vesey*, 52.
Ex parte Taitt, 16 *do.* 193.
Dutton vs. Morrison, 17 *do.* 193.
Ex parte Wilson, 18 *do.* 441.
Howe vs. Lawrence, 9 *Cush.*, 553.
[illegible] *vs. Mudge*, 14 *Gray*, 534.

The case of *Ex parte Ruffin*, which is one of the great landmarks in the law of partnership, presents this principle in a strong light.

The facts were these :

A. and B. were partners in business, owning firm property, and owing firm debts, to a large amount.

A. sold his interest in the firm assets to B., who, in part consideration thereof, agreed with A. that he would assume and discharge the partnership indebtedness.

B. continued to carry on the copartnership business for about a year, when he became insolvent, and a separate commission in bankruptcy was issued against him.

A part of the original partnership property consisted of choses in action, which, at the time of the adjudication of B.'s bankruptcy remained in specie, and passed to his assignees.

No commission had been sued out against A.

Certain of the *copartnership* creditors applied to the Chancellor (Lord Eldon) for leave to prove against the estate of the bankrupt ; or, at least, for leave to have so much of the

copartnership property as remained in specie applied to payment of the copartnership debts remaining outstanding.

But the Chancellor denied the application *in toto*, holding that the creditors of the firm had no *lien* upon the firm property, when the assignment thereof from A. to B. took place; and that such transfer extinguished the copartnership character of the property; and, further, that so long as one member of the copartnership remained solvent, that is to say, was neither in bankruptcy nor insolvency, the joint creditors must seek their remedy against him, and could not come in upon the separate estate of the bankrupt partner.

The case of *Howe vs. Lawrence* is still stronger, in its circumstances, if possible.

There, A. and B. being in copartnership, and owning firm property, and owing firm debts, A. assigned all his interest in the firm property to B., who, in consideration thereof, assumed the firm liabilities.

Some time afterward, B. failed, and went into insolvency separately, in one county, under the Massachusetts Insolvent Act, and A. also failed, and went into insolvency separately in another county of the same State.

Under these circumstances, certain firm creditors attempted to prove their claims against the separate estate of B.; which, under the exceptions to the general rule obtaining in England, they would have been entitled to do, since there was neither solvent partner, nor joint estate. The question came by appeal before the Supreme Court of the State, and that court were unanimously of opinion that the provisions of section 21 of the insolvent act of 1838, from which section 36 of the bankruptcy act of the United States was copied, governed in cases where a partner was separately in insolvency, as well as in cases where the entire firm was in insolvency; and that the effect of that section of the statute was to adopt the general rule, and to exclude all exceptions; and the application for leave to prove was denied.

Robb vs. Mudge was like *Howe vs. Lawrence*, in its circumstances, except that the selling partner remained solvent,

Of the few cases in the Circuit and District Courts which have held that the rule that firm property is assets for firm debts, and separate property is assets for separate debts, only applies when the entire firm is in bankruptcy, and does not apply where one or more of the partners are in bankruptcy separately, it would be enough to say that those cases cannot possibly be right, unless the English court of Chancery, the tribunal which has developed and perfected the entire bankruptcy system, as it now exists in this country, has, for the past century and a half, been wrong upon the same point.

But a still more conclusive answer to these cases, lies in the rule of statutory construction which this court laid down in *Tucker vs. Oxley;* namely, that the provisions of the bankruptcy act, not being original, but being derived from the jurisprudence of another government, those provisions must be accorded that force and effect which was accorded to them by the courts of the state from whose jurisprudence they were framed.

This consideration was, however, wholly overlooked by the cases referred to.

They also overlooked the further important fact, that this court, in the case of *Murril vs. Neill*, had committed itself to the rule, not merely as laid down by the English Chancellor, but in all its universality, as laid down by the Supreme Court of the State of Massachusetts, in the cases above cited.

The fact that the partners other than those in bankruptcy are abroad, out of the jurisdiction of the courts of the country, where the bankruptcy proceedings are pending, does not make the separate estates of the bankrupts assets for the payment of joint debts.

Barker vs. Goodair, 11 *Vesey*, 85.

Ex parte Melbourne, L. R., 6 *Ch. App.*, 835.

The authorities relating to the rights of partnership creditors upon the separate estate of a deceased partner, which are

cited and relied upon by the government, do not contain anything militating against the rule herein contended for.

The rights of joint and separate creditors upon the estates of bankrupt copartnerships, and upon the estates of bankrupt individual members of copartnerships, have so often been directly passed upon by the courts, and have been so long and so well established, that resort to any other class of cases is entirely superfluous.

But none of the cases relating to the rights of firm creditors upon the separate estate of a deceased partner, do any more than to accord to such creditors the right to divide among them the surplus of the estate, after the separate debts have been paid.

Lodge vs. Prichard, 1 *D. J. & S.*, 610.

THIRD.

If the act of 1797 *could be deemed to include cases where one or more partners of a firm indebted to the United States are separately in bankruptcy, the priority of the United States conferred by that act would attach only to the surplus of the separate estates of such partners, after payment of their respective separate debts.*

Such is undoubtedly the effect of that act in all cases to which it applies.

The intent of the act was not to declare what should be deemed assets for the payment of debts, but only how the assets devoted by other laws to the payment of the debts of any insolvent or deceased person should be distributed.

The act plainly leaves the whole question, in all its bearings, of what shall be assets, to other laws; and in most cases to the laws of the States.

For example, what property shall go to the administrators of deceased persons as assets for the payment of general debts, may not be the same in all the States. In some States the common law rule as to assets may govern, while in others rules more liberal to creditors may exist by virtue of statutory enactment.

But, whatever the law of any State may be in respect to the character of property constituting the assets of deceased persons in the hands of their administrators, the United States are bound by such law to the same extent that individuals are.

If, by the laws of any State, the personal effects only of decedents constitute assets in the hands of their administrators for the payment of general liabilities, the United States are confined in their priority to the personal property. And they cannot come upon the lands of the deceased debtor in the hands of his heirs, except upon the footing of equality with other creditors.

U. S. vs. Crookshank, 1 *Ed. Ch.*, 233.

The act was not designed to open up to the government access to funds to which the body of general creditors of the same insolvent debtor cannot resort, but merely to give to the government the right to be paid in full out of the funds to which all the other general creditors may resort.

In cases of bankruptcy,the act was not meant to change the rule as to what constitutes assets for the payment of partnership debts, and what constitutes assets for payment of separate debts of the partners. This must be true if, as has been assumed, the act does not lay down any rule for determining what shall constitute assets, but merely prescribes a mode in which assets shall be distributed.

In so far as the act of 1797 relates to cases of bankruptcy, it speaks of something concerning which a thoroughly settled and defined code of rules has existed for more than a century, governing the subject matter in every minute particular, and clearly providing for every circumstance which can possibly arise.

And this code of rules, while it necessarily embraces many matters of mere arbitrary foundation, is made up mainly from the maxims of natural equity and justice.

It should not be presumed that the national legislature meant to break in upon so well adjusted and equitable a code of rules, to any greater extent than the language used in the statute plainly imports.

The act giving the United States priority, should be construed with considerable strictness, as it always has been, both by the federal and by the State Courts.

Certainly, in a court of equity, the force of the act should not be extended beyond the letter of it. In England, the Court of Chancery has never favored the prerogative of the Crown to have its process first executed; and it will suspend its rules of procedure, to permit a commission in bankruptcy to issue, when Crown process is threatened to be sued out against the debtor's estate.

Ex parte Mavor, 19 *Vesey*, 539.

There is no reason to regard the act of 1797, as interfering with any of the established rules of equity or of bankruptcy, in respect to what shall be deemed assets, for the payment of the debts of a particular insolvent person.

No judicial interpretation of the act, has ever put forth an intimation that it does interfere with such rules. On the contrary, the question whether the act has, in cases to which it applies, done away with the established rule, as to what are assets for the payment of copartnership and separate debts respectively, has been passed upon by the federal courts, and that rule has been held not to have been interfered with by the act.

U. S. vs. Hack, 8 *Peters*, 277.

Do. vs. Shelton, 1 *Brock.*, 517.

In no reported case arising under the act of 1797, has the government been accorded a priority of payment in respect to a partnership debt, out of the separate assets of the individual partners of a firm, over the separate creditors of such partners.

In *Harrison vs. Sterry*, 5 *Cranch*, 289, one of three partners of a firm, doing business both in Great Britain and in this country, resided here, and the other two resided in Great Britain.

The firm being indebted to the United States, as their bankers in London, became commercially insolvent, and the two foreign partners were adjudged bankrupt under the English

acts, and the partner residing in this country was adjudged bankrupt under the act of Congress of 1800.

The United States seized certain property of the firm, under process of court, for payment of its debt, and a dispute between them and other creditors as to the distribution of the attached property having arisen, and been brought before the Supreme Court, that court ordered one-third of the property in controversy to be turned over to the assignee in bankruptcy of the partner resident here, absolutely, as the share owned by such partner in the property, and directed the United States to be paid out of the remaining two-thirds.

The rights of the United States under the act of 1797, are not only subject to the rules of equity and bankruptcy as to what shall be deemed assets for the payment of partnership and separate debts, but they have likewise been uniformly held by the federal courts to be in strict subjection to the established rules of equity generally.

Brent vs. Bank of Washington, 10 *Pet.*, 346.

U. S. vs. Amory, 5 *Mason*, 455.

The act of 1797, therefore, standing by itself, would leave the bankruptcy rule defining what are assets for the payment of partnership debts, and what are assets for payment of separate debts, in full force.

FOURTH.

In cases arising under the present bankruptcy act, the provisions of that act must be looked to for the purpose of ascertaining what rights of priority the United States have over other creditors of the bankrupts.

The position assumed by counsel arguing on behalf of the government is, that for the purpose of ascertaining what rights of priority the United States have over other creditors, in cases arising under the present bankruptcy act, the provisions of that act are not to be examined; but that, ignoring the bankruptcy act itself, we must go back to the act of 1797, and examine its provisions exclusively.

This proposition, which forms the corner stone of the case of the government, must be grossly erroneous.

The bankruptcy act contains, within itself, a complete code of rules for determining how the property of a bankrupt debtor shall be disposed of, and the order in which creditors of every conceivable class shall be paid out of it.

The rights of the United States in the property are as distinctly set forth as are those of other creditors. In so far as the bankruptcy act treats of debts due to the United States, it does not refer to any other law; and reference to any other law to ascertain what the rights of the United States upon the assets of the bankrupt shall be, is not left necessary by the act.

As the act of 1797 covers several cases of insolvency, while the bankruptcy act, being long subsequent in point of time, covers but a single one of those cases, and treats of that one case in all its bearings, it may well be held that the bankruptcy act has superseded the act of 1797, as to cases arising under the former act.

But it is probably of little practical consequence whether the act of 1797 be considered as wholly superseded by the bankruptcy act as to cases arising under that act, or not.

The act of 1797 must, at the very least, be read and construed in connection with the bankruptcy act; and that not merely with the single section of the latter act which gives the United States priority, but as well with all other parts of the act which define what shall be assets for distribution among creditors.

If the act of 1797 be resorted to at all, as to cases arising under the bankruptcy act, it must not only be read and construed in connection with section 28 of the latter act, but also in connection with section 36 of it.

The very least force that can be accorded to the bankruptcy act, in respect to the priority of the government is, that it forms a part of the legislation of Congress upon the subject of such priority; and it must be received as the last will of the law-making power upon that subject, in so far as cases arising under the statute itself are concerned.

Counsel who argue for the government offer but one objection to the correctness of this proposition, and that is, that the United States are not bound by the bankruptcy act.

The argument is this: that any act of Congress which would operate to deprive the government of the United States of any special right or privilege, does not extend to nor bind it, unless the United States be specially named therein; that all bankruptcy acts are acts of that character; and that consequently, the present bankruptcy act does not affect any right or privilege enjoyed by the United States under any prior statute.

This argument is unsound in at least *three* particulars, either of which would be sufficient to cause its overthrow.

1. Bankruptcy acts are binding upon the Government, whether mentioned therein or not, in all matters relating to the seizure of the bankrupt's property, and to the distribution thereof among his creditors.

2. The United States are expressly "named" in the bankruptcy act, within the meaning of the rule which the counsel rely upon.

Their debts are expressly provided for by the act, and a priority over other creditors is thereby given them.

3. The present bankruptcy act does not operate to deprive the United States of any right or privilege enjoyed by them, under any prior statute.

Several English cases have held the crown not to be within the bankruptcy acts of Parliament. The following comprise most of the principal cases of that character:

Anonymous, 1 *Atkyns*, *Case* 142.

King vs. Mann, *Strange*, 749.

Brassey vs. Dawson, *do.*, 977.

Queen vs. Edwards, 9 *Exchq.*, 32, 628.

The ground assigned for the rulings in these cases is, that the crown is not named in the bankruptcy acts.

It is undoubtedly a principle of the English constitution, that an act of Parliament that would operate to deprive the crown of any *special or particular* prerogative, right, title,

or interest, shall not be deemed to extend to the crown, unless it be named therein.

In earlier times, when the royal prerogative was much more favored than in modern times, from the great and overshadowing influence of the sovereign, the principal was stated much more broadly; but, in recent periods, the rule has settled down to the conditions stated.

Potter's Dwarris, 151–152.

The rule which thus excepts the crown out of the operation of statutes of a certain character, is deemed one of the *prerogatives* of the crown; something belonging to the king as a mere branch of the state.

The purpose of the prerogative is nothing more than to preserve the executive department of the government against encroachment by the legislative.

1 *Black. Comm.*, 262 (*marg.*)

Parliament being omnipotent, its acts trenching upon the powers and immunities of the executive, have conclusive force; and, to the extent to which they go, they destroy such powers and immunities utterly.

In order, therefore, to preserve as far as possible the existing balance between the two departments of government, and to prevent annihilation of the powers and immunities of the executive branch by the legislative, the rule has been established, that the powers and immunities of the crown shall not be taken away by implication, but shall be surrendered by its free and express consent only.

All prerogatives of the crown spring out of *prescription;* and the English courts require the same evidence of the existence of a prerogative, as of any other prescriptive right.

King vs. Mann, Strange, 749 (758.)

All prerogatives of the English crown must, therefore, be *local* in character; and it is therefore doubtful whether any mere prerogative can be deemed to exist in this country, merely because it belonged to the British crown at the time of the revolution.

But, however this may be as a general proposition, the par-

ticular prerogative would seem to have no place or purpose here.

The forms of government in existence here, in all the States and in the country at large, render such a safeguard to the executive branch a useless thing; for the boundaries of the authorities and immunities of each branch of government, are distinctly marked out, and amply protected by fundamental laws.

The application of the prerogative in question, in England, has, for a long period, been quite limited; and it has often been adjudged, and is now well established, that all acts of Parliament for the promotion of equity, justice, and the public good, bind the crown although not named therein.

The following are some of the cases holding that doctrine:

Lord Berkeley's Case, *Plowden*, 222.

King vs. Wright, 1 *A. & E.*, 434.

De Bode vs. The Queen, 13 *do.*, 364.

With regard to what constitutes a *naming* of the crown, within the intent of the prerogative, in order that an act of Parliament may bind it, the rule is very strong against the crown.

No authority holds that anything more is essential to bring the crown within the force of a statute, than merely to mention it, as an object concerning which the act provides.

Potter's Dwarris 51-132

Lord Berkeley's Case, *Plowden*, 222, (248.)

And it has never been deemed necessary, when an act embraces a single matter, or several matters dependent upon each other, that the reference to the crown be repeated, in order that the entire statute may extend to him.

So far as the English bankruptcy acts are concerned, it is literally true that the king has not been even mentioned in them, and no reference has therein been made to his debts, except in the very latest acts.

Debts of the crown have not been deemed to be in any manner provided for in the acts, except in the very latest ones, and those provide for the payment of taxes only, leaving all other

forms of indebtedness to the crown wholly unprovided for as in the prior acts.

In the argument in *King vs. Mann, supra*, it was stated by the counsel for the crown, without contradiction or comment either by the court or the opposite counsel, that the crown cannot prove its debts under the bankruptcy acts, and that it is outside of those acts for every purpose.

Strange, 751-2.

The law was undoubtedly well stated by the counsel; and no case can be found where the crown has ever attempted to share in the distribution of a bankrupt's assets, under any save the latest acts, and then only to the extent of taxes. It is true that in certain cases, where officers of the crown have been entitled to demand and receive taxes from the bankrupt, they have been permitted to prove the debt for the same in their own names. But, in all such cases they have come upon the assets by the same modes as private creditors, and have shared in the distribution equally with them. They have been required to make proof in the ordinary way, and their debts have not been favored with any priority over other debts.

Eden on Bankruptcy, 101–2.

It is a significant fact, that in the late acts, which provide for the payment of taxes in express terms, and accord them a priority, debts due to the crown are expressly excepted from the effect of a discharge. It can hardly be doubted that an act of Parliament, framed in the same terms as the bankruptcy act of the United States, and providing for the payment of the debts of the crown, and giving to them a priority, would be held by the English courts binding upon the crown in every particular, even in the matter of discharge.

But, when the English courts have said that the bankruptcy acts were not binding upon the crown, the expression was not meant to be taken as true in a general sense, but only as true with reference to the particular point before the court.

The crown has never been held exempt from the force of the bankruptcy acts, in any other than two particulars.

1st.—It can seize the bankrupt's property under process of

court for payment of its debt, at any time before actual assignment.

2d.—Its debt is not barred by a discharge of the bankrupt from his debts.

In all other respects, the crown has been held to be bound by the bankruptcy acts as fully as private persons are.

It has never been suggested, so far as a careful search among the authorities has been able to develop, by any English court or law writer, that all those parts of the bankruptcy acts which provide for the seizure of the bankrupt's property, and for the distribution of it among his creditors, are not as binding upon the king as they are upon his humblest subject.

As to the estate of the bankrupt in the hands of the assignee, the crown is bound conclusively, and at all points. It can take nothing in that estate except what the acts themselves give it, and it can take that only in the mode, and to the extent, pointed out by the acts.

The exigencies of this case do not require an examination into how far bankruptcy will prevent the United States from pursuing its legal remedies, by action and execution, against its debtor.

But it may be safely assumed that the United States are bound by the bankruptcy acts of Congress, to like extent, and upon the same points, as the English crown is bound by the bankruptcy acts of Parliament.

It must be taken as a correct proposition, therefore, that all those parts of the bankruptcy acts of Congress, which provide for the seizure of the property of a bankrupt debtor out of his hands, and for the distribution of it among his creditors, and for the mode of such distribution, are completely binding upon the United States.

But those provisions of the bankruptcy act which define what shall be assets for the payment of partnership and separate debts, respectively, in cases arising under that act, could not, in any view, be regarded as taking away, or as modifying to their detriment, any rights secured to the United States by any previous statute.

Since the act of 1797 does not determine what shall be assets for distribution in the mode it points out, but leaves that subject for determination by other laws, every subsequent act defining what shall be assets for the payment of the debts of a deceased person, or of one legally bankrupt or insolvent, must be perfectly binding upon the United States.

This would be true, as has been shown, even of the statutes of States. A State may, at any time, enlarge or diminish its rules as to what shall be assets of a decedent in the hands of his administrator, and the advantages flowing to the United States from the act of 1797, will be enlarged or diminished accordingly.

If this proposition be true,—and its truth cannot be doubted —how much clearer must it be that the rights of the government under the act of 1797, are to be regarded as held subject to all such general laws as may be passed by Congress, defining what the assets of a bankrupt copartnership, or of a bankrupt single partner may be, for the payment of their respective liabilities.

Besides, it must always be remembered, that section 36 of the bankruptcy act does not embody any new idea, but that, on the contrary, it merely puts into express words what has, ever since the beginning of the government, been a thoroughly established legal principle, in force throughout the country. The idea is one founded upon the maxims of equity and justice, and one which the government should not be held to have abolished as touching its own demands, without an express declaration of its intention to do so.

II.

IN CASE THE GOVERNMENT IS ENTITLED TO THE PRIORITY WHICH IT HERE CLAIMS, WHAT WILL BE THE RIGHTS OF THE SEPARATE CREDITORS OF THE BANKRUPTS, IN THE SECURITIES HELD BY THE GOVERNMENT ?

When one or more partners of a firm are adjudged bankrupt, the effect is to transfer the interests of such partners in

the firm assets, to their assignees in bankruptcy, and the firm is thereby dissolved.

Story on Part., section 313.

In England, the title of the assignee relates back to the commission of the act of bankruptcy; and in that country, therefore, the copartnership is treated, upon an adjudication of the bankruptcy of some of its partners, as having been dissolved at the time of the commission of the act of bankruptcy.

Story on Part., section 314.

Dutton vs. Morrison, 17 *Ves.*, 193.

But, in this country, under the present bankruptcy law, the title of the assignee only relates back to the filing of the petition in bankruptcy; and, therefore, the copartnership, upon an adjudication of the bankruptcy of some of the partners, can be considered as having been dissolved only from the time of the filing of the petition.

Bankruptcy act, section 14.

The effects of a dissolution of copartnership are such, that, thereafter, the power and authority of the several partners to any further employ the property, or funds, or credit of the partnership in the business thereof is at an end; and that, thereafter, none of the partners can create any new contracts or obligations binding upon the partnership; and that thereafter none of them can buy, sell, or pledge goods on account of the partnership, or in any other way make their acts the acts of the partnership.

Story on Partnership, sections 322, 339.

Bell vs. Morrison, 1 *Pet.* 351.,

Upon the dissolution of a firm by the bankruptcy of some of its partners, the only remaining authority of the solvent partners is to use the firm assets in their possession, and under their control, in the payment of firm liabilities consummate at the time of the bankruptcy.

Story on Partnership, section 339.

Upon the dissolution of a firm from any cause, each partner and his assignees, and in case of bankruptcy his creditors, have an equity to say that the assets of the partnership shall be applied to the payment of the partnership liabilities exist-

ing at the time of the dissolution; and no partner can put the firm assets to any other use. If one partner, after dissolution of the firm, transfer the property in any other way, the transferee takes no title as against the other partners, or as against their assignees, or in case of bankruptcy as against the creditors of the partnership, or of the partners respectively.

The consequences of these rules of law are, that as to all the property of the firm of JAY COOKE, MCCULLOUGH & Co., situated in the United States, and therefore within the jurisdiction of the Court of Bankruptcy, that firm must be considered in the courts of this country, and as to citizens of the United States, as having been dissolved on the twenty-fifth day of September, A. D. 1873, the day of the filing of the petition in bankruptcy against the seven of the ten partners of that firm residing in this country. The partnership creditors of JAY COOKE, MCCULLOUGH & Co., and the creditors of the bankrupt partners of that firm, have the right to insist that all the assets of the firm of JAY COOKE, MCCULLOUGH & Co., situated in this country on that day, shall be applied exclusively to the payment of the then existing liabilities of that firm. Upon the filing of the petition for adjudication of bankruptcy, all authority of the solvent partners of the firm to create new debts against the firm, or to employ the assets of the firm for any purpose other than the payment of the then existing liabilities of the firm, ceased; and all further acts of such solvent partners, by the way of the creation of new debts, and the giving of security therefor upon the assets of the firm, were null and void. Whoever dealt with the solvent partners of the firm concerning the firm assets, subsequent to September 25th, 1873, did so at his peril, and subject to the risk of losing his rights by a subsequent adjudication of the seven partners resident in this country to be bankrupt.

The rule which prevents the solvent partners of a firm from disposing of firm assets, except to pay existing firm debts, after petition in bankruptcy filed against some of the partners, is in the highest degree equitable and just, and is absolutely necessary for the protection of creditors against the grossest frauds.

The commencement of bankruptcy proceedings is something open and notorious,—a matter of public record,—and it is certainly fair and proper that those dealing with a partnership, shall inform themselves of the fact whether bankruptcy proceedings against any or all of the partners have been begun.

The government, therefore, as against the creditors of the firm of Jay Cooke, McCullough & Co., and as against the creditors of the bankrupt partners of such firm, hold its collaterals as security for the debts contracted prior to September 25th, 1873.

The United States being a secured creditor, it cannot come against the assets of any of these bankrupts, in any event, except for the excess of its debts over the value of the securities held by it.

Such would be the rule in absence of statutory provision to that effect. But it is expressly required by sec. 20 of the bankruptcy act.

When a firm creditor, holding firm security, seeks to enforce his debt against the separate assets of one partner, the separate creditors of such partner have a double equity to have the debt first reduced by the value of the security. In such case, the separate creditors are entitled to have the debt reduced by the value of the security merely because the debt is a *secured debt;* and they are entitled to such reduction upon the distinct and additional ground that *firm assets* are to be *first* applied in payment of *firm debts.*

Where, as in this case, a firm owing a certain debt, has specifically appropriated firm property for its payment, it would be most unjust to the separate creditors of the individual partners, if such property should not be applied in the way agreed upon, before resort is had to the separate assets.

And equity will not permit a resort in such case to the separate assets, until the application has been first made.

Lindley on Part., 1235.

Exp. Smith, 2 *Rose*, 67.

Exp. Barclay, Glyn & J., 272.

In the case of *United States vs. Shelton*, 1 *Brock.*, 517, *Ch. J. Marshall* declared, in most positive terms, the right of

the separate creditors of one member of an insolvent partnership, to insist upon the United States satisfying a claim which it held against the firm, and in respect to which it was entitled to priority of payment, out of the partnership assets.

This right was asserted by the Chief Justice to spring out of fundamental principles of equity.

Can the right be any the less clear, because the firm property is in the hands of the creditor himself, who seeks payment of his debt out of the separate property of the partners, instead of being in the hands of the assignee from whom payment of the debt is sought ?

It seems impossible that it should be.

W. P. Clough,
Of Counsel for DeGraff & Co.

LEWIS	)	APPEAL FROM THE CIRCUIT COURT,
vs.	)	EASTERN DISTRICT OF
THE UNITED STATES.	)	PENNSYLVANIA.

APPELLEE'S BRIEF.

The decree declares the United States is entitled to funds in the hands of Lewis, as Trustee in Bankruptcy, in payment of a debt due by Jay Cooke, McCulloch & Co.

It is admitted that seven members of that firm by which the debt was contracted are bankrupts; and there are three partners not bankrupt, who reside abroad.

And that the firm of which they are members was a debtor to the United States, at the date of the bankruptcy, for £132,616 9.8. Stg., and that the debt remains unpaid.

The Statute of 1797, c. 74, s. 5, enacts:

*That where any * * person hereafter becoming indebted to the United States * * shall become insolvent * * the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof * * as to cases in which an act of legal bankruptcy shall be committed.*

There has been a legal bankruptcy by the seven partners, whose individual estates are the subject of the decree. And the first question is, are they debtors of the United States, within the meaning of the Act of 1797, because the firm of which they were members was a debtor?

It is immaterial whether their liability as partners created a legal or only an equitable debt.

2 Cranch. 385.
2 Wheat. 426.
12 Peters. 134
5 Peters 172

The Statute gives the priority in the latter, as well as in the former case. 2 Sumner, 133, Howe *vs.* Shepperd.

It is difficult to perceive why a person liable to be sued on a contract for money had and received, one whose private property will be immediately liable to execution on the judgment, and where the contract is technically described as made by *him* under the *firm* of, &c., which is the form of pleading such a liability is not a debtor. Moreover, if the partner is not a debtor, a payment by him of the firm's debt, or a security given on his private estate, would be fraudulent as a gift, which is absurd, seeing that the creditor could lawfully collect that debt by execution out of the private estate.

But the authorities are too numerous to render it proper to argue such a question.

5 Howard, 133, Nelson *vs.* Hill. A creditor can immediately proceed against the executor of a deceased partner, and that in the first instance.

2 Younge & Coll. Exch., 553, Thorpe *vs.* Jackson. It was admitted this rule prevailed in all cases of mercantile obligations. The contention was it did not extend to other joint obligations, but it was held the rule was universal.

6 Vesey, 126, Ruffin, ex parte. 1 Mylne & Keen, 582, Wilkinson *vs.* Henderson. The reason there given is irresisti-

ble. On whom (asked the Court) ought equity to cast the burden of settling which of two joint obligors shall pay—on the creditor, or the executor of the deceased debtor? And it was held that an averment of insolvency of the surviving partner is immaterial, and not required in a proceeding for a partnership debt against the estate of a deceased partner.

So in bankruptcy. 1 Atkyns, 133, Crisp, ex parte. One of three partners having been adjudicated, to entitle him to a *supersedeas* he must pay the joint creditors that had proved, though the non-bankrupt partners were not insolvent. It was held that after payment, equity will settle the claims between the bankrupt and the other partners, and the partnership securities thus taken up will stand to cover the balance between the partners when adjusted.

2 Cox, 372, ex parte Clegg. Proof by joint creditors allowed, there being but one partner bankrupt, without inquiry as to non-bankrupt partner; and this, after the most strenuous urging of the only real point made here by the defendants, that it is the firm that is the debtor, and not the persons who compose the firm. Though the point was put in a rather more available form, viz.: the creditor having taken a joint obligation, must stand by it. The reason of all this is stated in Devaynes *vs.* Noble, 1 Merivale, 564, *the debt is joint and several.*

And there is another conclusive circumstance in this case, though quite unnecessary to be resorted to. The non-bankrupt debtor partners are abroad, and without the jurisdiction of the Courts of the United States. This fact is deemed in equity as equivalent to an ineffectual proceeding against them up to sequestration. 2 Atkyns, 510, Darwint *vs.* Walton.

The fact of bankruptcy bringing this right of priority into play, the mode of enforcing it had been settled since 1838. 12 Peters, 102. And this accounts for and explains the absence of any other than the one provision in the present bankrupt law relative to claims of the United States. The Act of 1797 does not create a lien, nor give the right to execution on goods assigned, nor avoid the assignment in bankruptcy. On the contrary, by creating a superior right to payment, it has confirmed the transfer to the bankrupt assignee or trustee.

But it secures the right it gives by creating by implication a trust in favor of the United States to the extent of their claim, 12 Peters, 102, Beaston *vs.* Farmers Bank of Delaware.

This having been settled as the effect of the Act of 1797, when bankruptcy occurs, the bankrupt Act of 1867 did no more than direct the payment of this debt as a preferred claim next after the expenses of administration. Act March 2, 1867, § 28, (near the end.)

There is then on the part of the United States—

1. The right as creditor. And between creditors, as such merely, equities are equal.

2. This creditor has a priority over all others by law.

3. That right is a statutory one, and therefore stands on as high ground as is known to the law.

4. The statutory grant of priority makes no exception, and imposes no condition except that there shall be a bankruptcy *or* a declared insolvency. The conditions are alternation.

It must be plain that the United States is within the letter of the Statute, and if the right there given is not to be inforced it must be upon grounds which make this an exceptional case.

It may be premised—

1. A person alleging that his case is an exception to a statutory grant is bound to show that this was intended. 4 McLean, 633, United States *vs.* Duncan.

2. Exceptions introduced by equity to produce equality among creditors cannot apply to a statute whose only purpose was to prevent equality by securing a preference.

The rules of equity for marshaling assets do not extend to a claim of the United States under this statute. United States *vs.* Duncan, ut sup.

The case of the United States being certainly within the letter of the Act of 1797, the argument will turn on the points by which it is sought to remove it as exceptional.

These have been very numerous, and as they may be urged here, will all be noticed.

It was contended—

1. *The Bankrupt Act of 1867 repealed the Act of 1797.*

Answer. The two are not only consistent, but the latter recognizes the right created by the former and inforces it.

2. It was said, *that Act directs joint effects to be applied to joint creditors, and separate to separate.*

Answer. But the Act has no operation upon claims of the United States, except incidentally to secure the preference given by the prior Act of 1797. 20 Wallace, 251; United States *vs.* Herron.

Apart from this decision, which concludes the question, it is plain that this provision was not intended to destroy a right recognized in the same Act. Nor could it apply here, for

1. The rule never applies except where there are two funds to be administered. If there are no joint assets all creditors come in, *pari passu*, on the separate estate. Bump on Bank, 657; where the American authorities are collected. 2 Cox, 372; Clegg, ex. p.; 1 Atk., 133, Crisp ex. p.; 1 Rose, 273, Bradley *vs.* Millar.

2. If the United States have no claim on these separate estates, they have none upon any property or anything over which the Courts of the United States have any control. And the absurd result follows that a creditor having a preferred claim on all his debtor's estate is excluded altogether. For there can be no joint estate of the debtors of the United States, inasmuch as the joint debtors are not bankrupt as such, nor had the bankrupt debtors any joint estate; and this, on the demand of a creditor, who, by the Statute, is not to be paid till the debt of the United States is paid in full.

3. If this provision in the Bankrupt Act applies the surplus of the separate estates, after paying all claims on them respectively, will not go to the United States, but to the joint creditors of the bankrupts, and the United States is not one of them. Garland, one of the bankrupt firm, is not a debtor to the United States. § 36 provides. *If there shall be any balance of the separate estate of any partner after the payment of the separate debts, such balance shall be added to the joint stock for the payment of the joint creditors.* By joint creditors in the bankrupt

act, must be meant those who can prove against the joint estate.

Not being joint creditors. The United States cannot claim on that fund under that statute. If we are separate creditors *cadit questio* for we are by the Statute preferred as to any fund to which we are entitled, *i. e.* to any fund that arises from the property of our debtor.

4. But this rule in bankruptcy is a mere statutory enactment of a rule in equity intended to produce equality.

The true abstract equity was attempted in Bell vs. Newman, 5 S. and R., 78, but was found impracticable. The arbitrary rule has since prevailed and is universal. In asmuch as joint creditors *must* take the joint estate because their debtors alone own it, therefore, in compensation, equity gives the separate estate to the separate creditors, and not because they have any better right to that fund than the joint creditors have. That this is the ground of this rule is proved by the exceptions. 1. If there are no joint assets though the bankrupts are partners. 2. If the joint creditors are not partnership creditors, then all come in *pari passu*, 1 M. D., and D. 235, ex p. Buckingham; 1 Deac. 405, ex p. Crosfield.

3. It was said, *the rule that joint assets go to joint debts, &c., was a rule of property when the Act of 1797 was enacted, and hence that Act must be read as embodying it by implication.* The postulate is unfounded. If true, the consequence would not follow.

The rule is no rule of property—it is a rule of administration where a Court of Equity can interfere. If it were a rule of property it would extend to all cases which it is admitted it

does not, but only to those where there are two funds. Bell *vs.* Newman, 5 S. and R. 78, is conclusive that as a rule of property it was never heard of at that day, and as early as Lord Hardwick's time it is stated to be no rule of *law* but one *of convenience* merely, 1 Atk., 67, Twiss *vs.* Massey, 2 Peere, Wm., 500 Cook, ex: p: Lindley on Part: 120.

This is also proved by the practice in executions. If an execution on a joint judgment is levied, or the judgment becomes a lien on separate real estate, neither the levy nor the lien is divested by a subsequent levy or judgment for a separate debt, nor can they interfere with the prior liens. And if it were a rule of property, though equitable only, the books would be full of instances of injunctions against levies on joint debts upon separate property at the instance of separate creditors.

That a Court of Equity cannot interfere on such a ground is shown by Meech *vs.* Allen, 17 New York, 300; *In re* A. T. Lewis, 8 B. Reg., 546.

That the rule in practice is not to compel a creditor to select which of his two means of payment he will resort to, but if he selects that on which alone another creditor has a claim, that creditor shall stand in his shoes as to the fund which he otherwise *might* have taken, is shown by the authorities, though the language used would imply that the Court actually bars a creditor from a legal remedy because he has another fund. No instance is known where this was done; the other course is always adopted.

Athol *vs.* Lannoy, 2 Atk., 444. The decree was, "if the "money arising from the sale is insufficient, &c., then the "plaintiff is to stand in the place of the defendant, and to have "the benefit of the covenant," &c., p. 445, in the note from the

Register's book. Aldrich *vs.* Cooper, 8 Ves., 382; if he takes it out of the freehold, those who are thereby disappointed must stand in his place as to the copyhold. And Story (Eq. § 563) states this is the usual form of the decree: "in case the "specially creditors exhaust any part of the personal estate, "the simple contract creditors are to stand in their place and "receive satisfaction out of the real assets." If ever there was a decree compelling an election, it doubtless was where the funds were in hand and a mere caprice of the creditor was restrained.

But in § 560 it is stated, this rule is never applied in such a case as this, *i. e.* against a party having a title to the double fund (here the securities) and without injustice to the common debtor. Kent, Ch., admits it all depends upon whether it can be shown by the claimant that A ought, as between himself and B, to pay the debt of the two. 4 John Ch. Rep. 20.

There is one case in England in which Sir. John Leach was misled by the supposed equity of one creditor to interfere with anothers rights. Greenwood *vs.* Taylor, 1 R. & My., 185.

But it was shown to be wholly without foundation and an entire misapprehension of the mode in which the rule is worked out, 2 My. & Craig, 443, Mason *vs.* Bogg, and was discarded by Lord Cottenham. And the true rule is laid down in 6 Beav. 840, Bowser *vs.* Cox, and recently elaborately argued and ruled, 3 Chancery Appeals 767, Kellock's case.

If it were true that this rule was one of property, the consequence would be not to import such an exception into the statute, but to destroy the application of the rule as against the United States. For it is clear that whatever could have been seized under execution on a judgment by the United States

was subjected to the priority; otherwise the Act of 1797 narrowed instead of enlarging the right. As to the power of the United States to interfere with such *a rule of property*, see post.

4. It was said, *the rule is where there are two bankrupt firms, to aggregate the claims against each and divide the surplus of the separate estate between the assignees of the two joint estates pro rata.* That is merely a convenient mode of administering the surplus of private estates in bankruptcy, after paying the private debts, to avoid proving all the joint debts over again, by paying to the trustees of the classes. It presupposes bankruptcy of the two firms and the absence of any right of priority.

5. It was contended *that the United States was bound to exhaust the collaterals they hold before claiming on the general fund.*

The provision in the Bankrupt Act on this subject is out of the case, for the United States is not governed by that statute, 20 Wallace, 251; nor does it claim in bankruptcy; even if it did and the statute applied, it would be idle to compel a creditor entitled to priority out of everything to do that.

But the question is of vast importance to the United States. The real object is to compel the United States to apply their securities to one of two debts in relief of a claimant on the fund in Court, and leave the other claim of the United States without security. Is there a case of good authority which rules that a creditor having contracted for and got a security, cannot claim as a creditor on a general fund retaining his securities to meet the deficiency, and [in this case] to meet another debt for which it is also pledged? Can it be said that one creditor can

compel another so to levy his execution, as to destroy the only security he has for another debt? This is the real point. What is the rule as to sureties? can they demand that the remedy against the principal shall be exhausted before they can be called on to pay? Or an endorser? Or bail in stay of execution? Is a creditor less a creditor because he has security? Has a creditor a better right against another creditor than a surety has?

It will not be pretended that at *law* any one can interfere with a creditor on that ground. From the earliest day subrogation was the remedy, and it is equitable merely. The mode of inforcing this was to redeem the debt and take the security. But this right of the United States is a legal one. A Court of Equity cannot interfere with the enforcement of such a right except on payment or security equal to payment, 16 Eq. Ca. (Law Rep.) 99, ex p. Till.

Apart from a statute a creditor has never been required to realize on his collateral before claiming on a footing of other creditors, even in equity.

The gross injustice of such a rule is pointed out in 3 Chancery Appeals 769, Kellock's case, see also Mason *vs.* Bogg, 2 My. & Cr. 443, Bowser *vs.* Cox, 6 Beav. 84, Lindley on Part. 1099.

2 Barr., 304 (Penna.) Shunk's appeal.

Mortgagee may prove on his bond and reserve mortgage to cover the deficiency. In *Re* Trustees of the Bank of the United States, 2 Parsons Eq. cases, 110, the converse was ruled, but the case was reversed by a unanimous Court on appeal. the record shows this, though it is unreported. 6 Watts, 221; Keyner *vs.* Keyner. The Court cannot interfere with a

creditor at the instance of another creditor till he is paid. 8 Watts and Sergt., 327, Ebenhardt's Appeal. Creditors of A. and B. cannot be compelled to go against A. by a creditor of B. 9 W. and S., 36, Neff's Appeal. Creditor cannot be compelled by a surety to go against the principal in the first instance. S. P. 1 Penna., 425, Gro *vs.* Huntingdon Bank. 17 New York, 300, Meech *vs.* Allen.

The present case is an illustration of the rule and of its necessity.

To whom do these collaterals belong? Certainly to the firm of Jay Cooke, McCulloch & Co. If the bankrupt partners are debtors to that firm their creditors will, by this contention, if successful, compel the United States to sell the property of a creditor partner of the firm rather than go against the estate of the debtor partner.

But that is not all. These creditor partners have pledged these securities for another debt to the United States. As between themselves and the bankrupts they had the right to do this. The contention is that a creditor of this debtor has the right to compel the United States to apply the security in ease of the claim of the creditor to the detriment of the owner of the security, and to the detriment of themselves as holders of the pledge, and in destruction of the pledge for the later debt.

It must be remembered too, that this second debt was contracted before the adjudication, and consequently before the firm was dissolved. *Ex parte* Smith, 5 Ves., 297.

So that apart from all other questions there was a right to pledge the firm assets for its payment.

But the rule that governs this case is too well settled by authority to need more than its statement. The right of a

creditor to cast the onus of a debt on another, to relieve his only fund or security, depends on the state of the account between the debtors, and the absence of right in another creditor.

If A. ought to pay rather than B., then no wrong is done by compelling him to pay. But if A. ought to pay as between himself and B., to compel B. to pay upon an equity of A's creditor is mere injustice, and not even a caricature of equity. In such matters the right is only that of one of the debtors. His creditors can have no other right than he has.

5 Hare, 66, Way *vs.* Bassett. One creditor, as respects rights against others, is in the position of his debtor. He can demand nothing which that debtor could not himself demand.

8 Harris, 384, Lord *vs.* The Ocean Bank. There a creditor sought to bar a claim because the holder held collaterals. It was ruled he had no greater right than the debtor himself.

17 Vesey, 520, ex p. Kendall. A creditor of A. cannot compel the creditor of A. and B. to go against B. unless A. himself has the right to compel B. to pay the debt.

6 Vesey, 126, ex parte Ruffin. The rule applies to an assignee in bankruptcy.

7 W. and Sergt., 99, Coates' Appeal. Till payment there can be no subrogation to the rights of a creditor.

3 Watts, 477, Miller *vs.* Jacobs. One creditor cannot be compelled to make room for another if a third is incommoded.

5. It was contended *that the remedy against the non-bankrupt partners, or the debtor firm, should have been first exhausted.* The question is the same as the last, though in another form.

Does the statute of 1797 impose this as a condition on the United States? Does the Act of 1867, directing this debt to be first paid, require it?

Even the rules in equity do not. Thorpe *vs.* Jackson, Wilkinson *vs.* Henderson, and Nelson *vs.* Hill, 5 Howard, *ut sup.* expressly exclude such a rule as respects the right to sue and obtain a decree for account and payment.

If it be conceded that equity will, in administering the funds, apply joint to joint, &c., this proposition fails here, for equity cannot disregard a legal right, or a trust created by statute, to secure priority, and send the United States as a suitor in a foreign tribunal to exhaust their remedy against a co-debtor. Obviously this is merely asking to restrain the creditor from going against A., till he has exhausted the remedy against A. and B. jointly. Can a precedent be found for such a thing? And who is it that asks this? The representative of another creditor.

That this right is purely *equitable* and dependent on the relative rights of *his* debtor and *our* debtor on each other has been shown. See ante p.

The debtors to be exhausted are abroad. This is equivalent to exhaustion of the remedy against them. 2 Atkyns, 510, Darwint *vs.* Walton.

But it must be obvious if *equity* can compel this, the same equity will enable the foreign partners to show that these bankrupts ought to pay this debt, and have no claim to be freed from the liability out of firm assets.

6. It was contended *that the Bankruptcy Court has exclusive jurisdiction.*

This is settled by United States *vs.* Herron, 20 Wallace. It was really decided in Harrison *vs.* Sterry, 5 Cranch, 289. The result of such doctrine would be to leave the legal right of the

United States to the *discretion* of a committee of creditors, who are agents, selected by the adverse interest, which, to say the least, is not the probable intention of Congress.

7. It is said, *the case is to be treated as if Cooke, Moorehead, &c., had been separately adjudicated.*

Answer. Then the United States would take the fund.

1st. Under the Act of 1797.

2d. Under the express terms of the Bankrupt Act.

Unless the fact that there is also another joint debtor, not bankrupt, excludes the United States.

There is nothing in either statute that makes such an exception.

8. It is said, *the case is not within the Act of 1797, because the debtor firm not having been adjudicated, there is no complete insolvency.*

Answer:—

1st. The United States does not claim here because of insolvency, but because of bankruptcy.

2d. If insolvency were the ground, a declared insolvency of one of several joint debtors is within the Act, so far as his estate is concerned.

Unless the Court undertake to impute an exception without any authority from the Legislature.

And what reason is there that will warrant this?

Consider where it leads. It will exclude all claims against sureties, if the principal is not a declared insolvent, and *vice versa.* For the only ground alleged is that there is *another* also liable.

If it be intended to assert that because the firm is not bankrupt, the bankrupt's interest in that firm has not been assigned, it is only necessary to remark that this interest has passed to his assignee.

United States *vs.* Shelton, 1 Brock., 517, which is relied on, decides no more than this. If the two funds are in Court, the separate estate will not be ordered to be paid to the joint creditor, though he has priority, till it is ascertained that the joint estate is insufficient.

If the bond was joint and separate, then equity gives the remedy on both, 3 Ves. 573, Burn *vs.* Burn.

9. It is said *non-residence of the debtor cannot extend the Act of 1797.*

That is not pretended. Our points are—

1st. Is it to be presumed that the right of the United States is excluded by implication, by the existence of a co-obligor not within the jurisdiction, and not subject to the statute?

2d. Absence from the jurisdiction is equivalent to proof of incapacity to compel payment by those persons. 2 Atkyns, 510.

10. It is said *only the remnants of the separate estates are subjected to joint liabilities.*

To maintain this it is, and must be held, that

1st. The United States is subject to the 28th clause of the Act of 1867, though not named, and that a right given by statute is thereby taken away.

2d. The clause in the same Act directing payment of their debt first must be disregarded.

3d. That the Act of 1797 is by implication repealed by a statute professing to enforce it, and which has been decided by this Court to have no other operation on the claim of the United States than to secure its priority.

11. It is said *because the Bankrupt Act is copied from the Massachusetts Insolvent Act, the construction given to that Act by* THE LOCAL *Courts* MUST *be followed.*

Answer. 1st. This argument is inconsistent with the main reliance of the appellants, which is, that the rule was one of property when the Act of 1797 was passed.

2d. The decisions in Massachusetts by resting on the words of the statute admit that nothing but the statute compels them to do such gross injustice as to exclude one class of creditors from participation in the only fund of their debtor that exists.

3d. The uniform ruling under the Act of Congress is contrary to that in Massachusetts, and in accordance with the rule in bankruptcy and in equity in England. See the cases cited in Bump.

4th. The general impression is that our Bankrupt Act was taken from the English Statute.

5th. But since the Bankrupt Law does not bind the United States in regard to discharges, why shall it be held to exclude it from a right conferred by the Act of 1797, in the event of the Act of 1867 becoming operative, viz.: *on the bankruptcy of a debtor.*

6. Surely it will be an incongruous result of the two statutes combined that bankruptcy, which by one Act is to give rise to

an exclusive right, is so dealt with in the Bankrupt Law as to give a better right to all other creditors.

7th. The argument is based on an entire forgetfulness of the origin of the rule, viz.: that it is a mere effort to equalize the separate creditors that have by law no special fund, with the joint creditors that of necessity have the joint assets. "The "rule precluding joint creditors from proving against the sep- "arate estate of a partner, for the purpose of receiving divi- "dends, does not apply to co-debtors who are not partners, "although a contrary opinion was expressed by Knight Bruce, "V. C., in a case before him." Robson's Bankruptcy 613, citing *ex parte* Buckingham, 1 M. D. and D., 235; *ex parte* Crosfield, 1 Dea., 405; 2 M. and A., 543; *ex parte* Benson, 2 M. D. and D., 750; *ex parte* Field, 3 *id.*, 102; *ex parte* Baultman, 3 Dea., 476. "The practice in these cases has been fully set- "tled. I have always understood that the rule which has "been so much pressed upon us, only applies to the case of "partners, and I think it would be mischievous to extend it to "the case of co-contractors." Sir G. Rose, *ex parte* Buckingham, 1 M. D. and D., 235; S. P. *ex parte* Crosfield, 1 Deac. 405, 2 M. and A., 543.

12. It is said, *the Act of 1797 leaves to the general law to regulate what are assets.*

Answer. 1st. Harrison *vs.* Sterry is misunderstood. The two-thirds were awarded to the partners *after* the United States was paid in full.

2d. The vice of this point is in confounding rules which define, with the rule by which the assets are administered. The law, whether statute or otherwise, that gives joint to joint, &c., is

not a law which defines what are assets, but one which defines the course of administration—that is, marshals them. Whatever property a creditor gets from his debtor must, of necessity, be assets. And the question is not whether the private estate of the debtor is assets, but to which class of creditors are they to go. If this property is *not assets*, the assignee is not entitled to it. If it is, then our priority attaches by the assignment. The real question, if it be one, is, whether this fund is the *estate* or *property* of the debtor to the U
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Tassey v Church 6 W 467.

13. It is said, *the bankrupt partners have the the partnership assets of Jay Cocke, McCulloch & Co., applied to the joint liabilities at the date of the petition.*

Answer. No one contests this. But what are those liabilities? Do they not include balances due between the partners on the final settlement?

It is somewhat premature to determine what are the rights of the foreign partners to the assets of the firm, and the right of subrogation against them before they are in Court to be heard. What the appellant asks of this Court is to postpone an acknowledged creditor till that point is settled.

14. It is said, that *the negligence of the United States has postponed them.*

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13. It is said, *the bankrupt partners have the right to have the partnership assets of Jay Cooke, McCulloch & Co., applied to the joint liabilities at the date of the petition.*

Answer. No one contests this. But what are those liabilities? Do they not include balances due between the partners on the final settlement?

It is somewhat premature to determine what are the rights of the foreign partners to the assets of the firm, and the right of subrogation against them before they are in Court to be heard. What the appellant asks of this Court is to postpone an acknowledged creditor till that point is settled.

14. It is said, that *the negligence of the United States has postponed them.*

The neglect consists in not going abroad to sue a firm when the debt was by a statute already secured on the private estates of the partners in this country.

5 Peters. 187 commit by attorney United.

15. And, that *the debtors are very remote, and the remedy by the assignee hopeless.*

Why his right is less hopeful than that of the United States against these persons would be, is not pointed out.

But no one has ever yet suggested that a creditor electing to sue one debtor at home can be met by a plea that there is another debtor 3000 miles away who possibly may be able to pay.

16. *It is denied that on the settlement of the accounts of Jay Cooke, McCulloch & Co., Cooke and Moorhead will be debtors.*

Tassey v Church 6 W.S. 467.

It is admitted that a firm of which they were partners is largely indebted to this firm. Is it disputable, that Cooke cannot claim a share of the assets till all his liabilities to that firm are charged off in account. But all this discussion is premature, unless an admitted creditor is to wait till the debtors settle among themselves which *ought* to pay.

17. It is said, *McCulloch & Co. will be benefitted.*

That is an accident merely.

18. It is said, *the right of the separate creditors in the separate estate is a vested right.*

Answer. 1st. It is admitted that at law there is not the faintest trace of such a rule. The practice in the sheriff's office proves that. If a horse is levied on for a firm debt no one ever asks whether there are private debts of his owner, when the execution creditor settles for the proceeds.

2d. If this was a vested right, in the proper meaning of that term, then legislation would be powerless. But there are no such rights unless by contract. In Pennsylvania we have a perfect analogy. Formerly specialty debts were paid first out of a decedent's estate. A statute put specialty and simple contract

debts on a level. No one ever dreamed of suggesting that the old rule gave a vested right.

3d. The right was no more than a rule of the Court in administering assets of insolvents. And the only question is—whether the Act of 1797 could and did disregard it. Its origin has been shown. The statute was intended to override that rule which was intended to produce equality, and the legislature had the power to do this. If it had not the power to do this, then obviously the statute never could, and never will operate, for there never was a time in which there was *no rule* for distributing the assets of an insolvent or bankrupt. And the argument is that a rule of distribution creates a vested right in the distributee.

19. It is said, *the United States is not preferred because—*

1. *By the assignment the creditors became the* OWNERS *of the assets in proportion to their interests at its date.*

2. *When the trust is created equity deals with the property according to natural justice.*

3. *By that rule joint creditors cannot prove against the separate estates till the separate creditors are paid.*

All this assumes that the statute which creates a paramount trust for the Government by the Act of Bankruptcy is subject to rules which prevent it from having any effect whatever. Or only to this extent, that as to creditors of one class it may create a priority.

And it is nothing more or less than a contention that a rule in equity to produce equality overrides a statute intended to exclude equality and give a preference.

The United States claims no right as against a lien that is contractual or specific. All that it claims is a right to a fund which is by law distributable among a class because the debtor is bankrupt. The class being all who are creditors of its debtor. But whether the persons composing that class are separate or joint or partnership, is as indifferent as whether they are by specialty or simple contract.

20. It is said, *the United States cannot claim against the joint assets of the bankrupts.*

Answer. The reason is, the debtors of the United States do not own that property. If they were a creditor of the firm they would certainly have priority on both estates, joint and separate, until paid; unless a rule in equity, which has no existence except in case of insolvency, overrides an express statute, giving the exclusive right on that event.

The sum of the matter is—

The United States had the right of a creditor before the bankruptcy; that right being legal, was, by the statute, upon bankruptcy happening, converted into a right to priority of payment out of all the property of the debtor in the hands of the assignee, and became a primary charge on the fund.

The object of the statute was to enlarge the previous right—to fix it upon the property, and to exclude the possibility of another creditor by any diligence, or by the will of the debtor, or by any legislation of the States obtaining anything till the United States was paid.

This right being *statutory* is as high, if not higher, than a right arising by contract out of the same act of bankruptcy, as gives rise to the statutory right, and therefore cannot be

displaced by any of those considerations by which equity to produce equality is governed in administering assets, commonly called the marshalling of assets.

As illustrations of the limit of the power of a Court of Equity to interfere with rights of creditors, we refer to 16 Equity, 98 Till *ex parte*. "The Court had no right to restrain a landlord from distraining," without providing a fund to pay him. 5 House of Lords, 455–6, Carron Iron Co. *vs* Maclaren, Ld. St. Leonards said: The rule (the restraining a creditor suing in another forum, when the Court is administering the estate), will not operate to destroy any priority to which from the nature of his security a creditor in Scotland or Ireland is entitled, and against the assets in either country, according to the law of the country, though they come to be distributed here; 3 Vesey, 573–82, Burn *vs.* Burn; an agreement for a several bond will be enforced after death, as against creditors to give holder the priority, which a specialty creditor is entitled to over simple contract creditors. † So that if the right of the United States, under the statute, rises no higher than that of a common creditor, which had the firm's signature and the partner's endorsement, if it is as high as the inchoate right of distress, or the inchoate right to get a lien, by obtaining a judgment or a contract for a specialty, equity would be powerless to interfere with those legal rights, though an advantage was thus obtained. *A fortiori* can it not interfere with a pledge, or with the legal priority given by the statute.

All that equity can do is to give to the creditor disappointed the right which the United States has as against another person or fund. But it cannot interfere with the direct and immediate enforcement of a legal and statutory right of the United States as a creditor to take *any* fund of *any* debtor till its

† 3 Vesey 114-19 Manning v Spooner. The rule as to the order in which property is applied to pay debts does not affect a creditor.
Sharpe v Earlsborough 4 Vesey 541. It is immaterial that a legal right can only be got at in Equity.

claim is satisfied. Nor can it impose terms and conditions not found in the statute.

In the light of the cross bill and answer, this serious question of fact arises, which must be decided before the dispute there arising can even be litigated.

The United States claim to hold the collaterals for two distinct debts of considerable dimensions. The debtor firm claims the right to have the securities applied to the latter debt. The United States as creditor claim the same right. If the debtor firm are, in fact, creditors of the bankrupts, as they assert, it is clear on a final settlement these securities must be so applied, for that firm are the owners subject to the pledge. The contention is, therefore, that the creditor shall not be allowed to enforce his right against one of his debtors till a litigation shall determine what are the relative duties of the debtors among themselves, and this claim is set up by a creditor of one of these debtors. And when will such a fact be ascertained, if seriously litigated, and at what expense? The dealings have been between two bankers across the ocean, resulting in a balance of $1,600,000.

The question then may confidently be asked, and the answer expected, such as was given in Wilkinson *vs.* Henderson. On whom should equity cast this burden? On the creditor of both the debtors who has a legal right, a preferred right, a statutory right, or upon the debtors themselves and their respective creditors, when the result is certain to disappoint some creditor under any possible state of affairs. And is it equity to delay the creditor till such disputes are settled?

Under the decree as it stands, the United States is paid an admitted debt, and under the cross bill its right to apply the

securities to the other debt will arise and be litigated. If there was no right to pledge these securities for that new debt, the United States having been paid the only debt for which they could be pledged, must surrender them or the proceeds, as it is the adjudication that severs the partnership; 5 Ves., 296, per Ld. ELDON, *ex p.* Smith.

But, if before the dissolution of the firm, which did not take place till the adjudication, so as to suspend the rights of the solvent partners to deal with the joint estate, though as to rights of property going back to the petition, there was a new debt contracted by the firm on the faith of a pledge of the firm's assets, the validity of that pledge, as between the pledgee and the partners, depends only on the right of the partners to use the firm name and assets in the business of the firm, and only as between the partners, and in case of a pledge for what the firm name could not be used, will its validity be questioned. For it is settled that after an act of bankruptcy by one partner, the right of the solvent partners to deal with the assets on joint account remains intact. 5 Maule and Sel. 336, Harvey *vs.* Crickett, and this even after notice. 4 B. and Ad. 130, Woodbridge *vs.* Swann; 3 Bos. and Pul. 465, Smith *vs.* Goddard. This will depend on the state of the accounts between the bankrupt partners and the firm. If the assets, including these securities, do not suffice to pay the balance due by the firm to the non-bankrupt partners; if after paying this debt to the United States out of the private estates, these bankrupts are still debtors to the firm, they and their representatives cannot ask subrogation by reason of these payments against the other partners to whom they will still be debtors on the settlement of the partnership.

All this is, however, to be settled under the cross bill; the present question is,—must the preferred creditor wait for this, and the fund be locked up till then.

EDWARDS PIERREPONT,
Attorney General.

R. C. McMURTRIE.

UNITED STATES
vs.
LEWIS.
} S. C. U. S.

REMARKS ON APPELLANT'S BRIEF.

p. 8. Why are securities by pledge more primarily liable than securities given by the statute?

p. 9. 6th Point. This rule is no more than that the surplus shall be divided among *all* creditors equally.

p. 9. 7th Point. If it be true they must submit to the statute as to distribution, still the argument is not advanced, unless, first, the express priority of debts due the United States be eliminated, or second, it is ruled that a partner is not a debtor, even in equity, for a firm obligation.

8th Point. The debtor is a bankrupt, if being a partner he is thereby a debtor, though only in equity.

p. 13–14. 1st Point. The trust for the United States is not created by the Bankrupt Act, but by the Act of 1797, coupled with the adjudication as bankrupts. The Bankrupt Act merely recognizes this right, and directs payment.

II. If the trust *arose* under the Bankrupt Act, *i. e.* were created by it—well—but the same trust arises upon insolvency, and on assignments in trust to pay creditors. Is the United States bound by the laws, or the deed directing distribution in

such cases, because the fact of insolvency is ascertained under them, which fact brings the Act of 1797 into play?

Does the Bankrupt Act exclude the ordinary jurisdiction to enforce claims of the United States against the bankrupt's estate?

Harrison *vs.* Sterry decided this by implication. United States *vs.* Herron directly.

But the 43d section is really conclusive. The machinery was intended for the parties claiming under the Act, not for the Government.

And by the Act of 1874 the Circuit Court is given concurrent jurisdiction as to all adverse interests.

If the right as creditor is not affected by the Act (United States *vs.* Herron) it would seem to follow that the right to enforce a paramount right is not subject to this jurisdiction as an exclusive one.

III. The assets here are not equitable in any sense of the word. They are proceeds of property sold by the assignee. Not funds which but for the rules of a Court of Equity creditors would have no right to. This is what constitutes equitable assets as distinguished from legal. Adams' Eq., 574.

The point made only applies where the property sought to be charged could not be reached at law, *i. e.* the law does not recognize the right to it, not to a right given by law as this is.

It does not apply to legal assets, though incapable of being got at except by the aid of a Court of Equity. Sharpe *vs.* El Scarboro, 4 Vesey, 541. But these assets are charged with a trust by statute.

And a priority arising from the form of the obligation (a specialty) over simple contract creditors is maintained even in equity. Burn *vs.* Burn, 3 Vesey, 573–82. *A fortiori* one intended to be secured as this.

2. What more conclusive proof that the right at law was exhausted, than the cases cited by appellants page 35, ruling that

the assignment had barred the right to levy, and turned that right into a trust for payment.

IV. Hays *vs.* Ward was rested on the fact that the creditor had rendered a security doubtful which existed when the surety contracted, and to which he was entitled.

p. 18. The proof of negligence of the United States consists in the absence of averment that it had not endeavored to collect the debt, and there is no allegation that such efforts would have been effectual. Was it ever before heard that one debtor was discharged by the failure to sue another for a year, he being out of the realm?

p. 19. Wilson ex. p. is nothing but a reiteration of the rule of Hunter *vs.* Gibson, that a British subject shall not evade the Bankrupt Act which compels equality, by suing in a foreign Court.

p. 20. 6 W. and S., 467-8. Tassey *vs.* Church, shows that the partners would be chargeable in account with all balances due by themselves or any firm in which they were partners. Nothing shows the absurdity of the alleged rule of the Roman law than this result, if such a consequence could be deduced—that a firm, all of whose partners but one are debtors to another firm, can compel the creditor firm to pay the balance—though the debtor partners, in fact, receive the benefit. It certainly is not English law. 7 M & G. 122. 9 Bl Com. 532

p. 21. *Ex parte* Crisp, 1 Atk. 133, proves that the firm creditor could not be compelled to look to a solvent partner by the debtor partner.

The argument would exclude the United States altogether if the partners had made separate assignments in insolvency, though the firm was really insolvent.

p. 23, Miller's Appeal. It is forgotten that the assignment relied on as vesting the title in the creditors declared the first trust to be, to pay all debts due the United States. Why did not that create an ownership as well as the trusts for creditors?

VI. If the equitable rule relied on overrides the statute, why will not another equitable rule that all creditors share equally?

The only reason is that the statute was intended to override these rules as well as local laws directing the order in which debts shall be paid.

But in truth no rule in equity overrides a legal right to secure a debt.

p. 22. L. J. Turner did this because the authorities have settled the rule where equity has the control, but only as an equity.

p. 32. If a debtor is deemed exhausted in equity, if he is abroad, and on that fact alone (Darwent *vs.* Walton, 2 Atk., 510), is it not absurd to say the creditor cannot move against a debtor at home till he has actually exhausted the foreigner.

In the cases cited a fund *had been received,* and the receiver was bound to put them into hotch pot by a statute.

Circuit Court of the United States.

EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES
vs.
EDWIN M. LEWIS ET AL.

Opinion of the Court, delivered October 5, 1875.

Circuit Court of the United States,

EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES
vs.
EDWIN M. LEWIS ET AL.

Opinion of the court, delivered October 5, 1875.

By STRONG, J.:

The bill and answer, together with the cross-bill and answer thereto, reveal the following state of facts:

On the 25th day of September, 1873, the London firm of Jay Cooke, McCulloch & Co. were indebted to the United States in the sum of £132,610 9*s.* 8*d.* sterling, and the debt remains unpaid. Of that firm there were at the time mentioned ten partners, three of whom are resident in London, England, and the other seven are residents in the United States. The seven resident here were also partners in the firm of Jay Cooke & Co.

On the 25th of September, 1873, a petition in bankruptcy was filed against the firm of Jay Cooke & Co., and on the 26th of November next following, the firm and its members were adjudicated bankrupts. Subsequently Edwin M. Lewis, the principal defendant, became the trustee under the 43d section of the bankrupt-laws. There is in the hands of the trustee a large amount of assets, which belonged to the bankrupt firm, and also a

large amount of cash and other property, real and personal, which was the separate property of the several partners of the firm. In view of this state of facts, the bill was originally filed. Its object is to subject the separate property of the bankrupt partners to the payment of the debt due to the United States from Jay Cooke, McCulloch & Co., in preference to all other debts due, either by the bankrupt firm or by the individual partners, and it rests upon the assumption that, as members of the London partnership, the bankrupt partners are debtors to the United States, each being liable for the amount of the indebtedness.

The facts thus stated are substantially admitted by the answer to the original bill, but it is averred that Jay Cooke, McCulloch & Co. are not bankrupts; that they have assets in this country, and in England; that McCulloch, one of the partners of the firm resident in England, has separate property in the United States; that the firm has pledged to the United States a large amount of securities and other property for the protection of the debt now claimed, and that the United States assert a right to apply these securities and other property to the payment of a debt subsequently contracted by the three non-bankrupt partners. The answer does not deny that generally the United States has a priority of claim against the estates of bankrupt debtors to it, over other creditors, but to evade the application of this acknowledged right to the present case it presents several considerations, most of which are merely formal, requiring little notice. They are, briefly stated, thus:

1st. That there is a large debt claimed to be due by Morehead, one of the bankrupts, which, if valid, is sufficient to absorb all the balance of his separate estates in the hands of the trustee.

2d. That the bill does not aver Jay Cooke, McCulloch & Co. to be insolvent.

3d. That the balances due to the firm by the partners respectively are not stated.

4th. That the bill avers no demand on the three solvent partners, nor refusal nor inability on their part to pay the debt claimed.

5th. That by a rule in equity, the private estates must first pay the private debts, and the surplus only can be applied to the firm debts.

6th. That the surplus of the separate estates should be apportioned among the creditors of the several firms, of which the partners were members, and that the claim of the United States can extend only to so much as the creditors of Jay Cooke, McCulloch & Co. would be entitled to out of the private estates of the partners.

7th. That a declared insolvency of Jay Cooke, McCulloch & Co. is necessary to give to the United States a priority over creditors whose rights became vested by the bankruptcy.

8th. That the United States have not proved their claim, and that there is no jurisdiction in this court.

9th. That the remedy of the plaintiff is at law.

10th. That the collaterals held by the plaintiffs should be first applied, or, if not, that the trustee should be subrogated.

Such are the defenses set up. In addition, the defendant Lewis has filed a cross-bill for the administration of the collaterals in the hands of the United States, and for an account of the assets of Jay Cooke, McCulloch & Co. In the present stage of the case, however, it is unnecessary to devote much attention to the cross-bill, or to the answer made to it, for they can have no

bearing upon the question we are now asked to consider. It is sufficient to say that, in the answer, the United States submits to account for the collaterals when the debts for which they were pledged shall be paid, but denies that there is any obligation to resort to the collaterals before claiming against the separate estates of the bankrupts. The answer also avers that the securities were pledged to secure a subsequent debt due the United States, for which the bankrupts are not liable, the debt having been incurred and the pledge made after the petition in bankruptcy was filed, and before the firm was dissolved by the adjudication.

There are other averments in the answer which need not now be noticed. The cross-bill, relating solely to the administration of the collaterals, cannot affect in the least the right of the United States to an immediate decree for satisfaction of the debt out of the private estates of the bankrupts, if the trustee has only a right to subrogation or redemption, on payment of the debt for which the collaterals were pledged. And that he has no greater right is very plain. The administration of the collaterals is a subsequent matter. The present question therefore is, whether, in view of the bill and answer, the plaintiffs are entitled to an immediate order for the payment of the debt due them out of the separate estates of the bankrupts, in preference to the claims of the other creditors.

The act of Congress of March 3, 1797, re-enacted in the Revised Statutes, (section 3466,) gives priority of payment to the United States in all cases of the insolvency of the debtor. Its provisions are that "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands

of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due the United States shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.' Now, that the bankrupts, who were partners in the firm of Jay Cooke, McCulloch & Co., are not only insolvent, but that they are debtors to the United States in the sum of £132,610 9*s.* 8*d.* sterling, is shown by the pleadings and by the admitted facts.

True, the debt was incurred by the firm of which they were members, but it is not on that account any the less the debt of each member of the firm. The liability of members of a partnership to its creditors differs in no essential particular from that of other joint debtors. It is true the joint effects of the firm must be applied to pay the joint liabilities, for such is the legal effect of the partnership agreement. The right of a single partner extends only to an account, and to a share of what remains after the debts have been paid, and his separate creditors can have execution of no more than is his. The inability of separate creditors of a partner to seize partnership property for the payment of his separate debts has, therefore, no tendency to show that each member of a firm does not owe the debts due by the firm. And it is well settled by judicial decision affirmatively, that each partner is a debtor to the creditors of the firm. If he be sued at law for a firm-debt, without a joinder of his copartners, he must plead the non-join-

der in abatement, or the creditor will be entitled to a judgment against him individually. So, if judgment be recovered against a firm, execution may be levied upon the separate estate of any of the partners. Equity, also, as well as law, regards each partner as a debtor to creditors of the firm—a joint debtor with each of his copartners; and that the estate of a deceased one of several joint debtors may be proceeded against in equity without regard to the solvency of the surviving debtors is no longer to be doubted. (Thorn *v.* Jackson, 2 Young & Collier, Exch., 553.) Numerous other decisions have been made to the same effect. Wilkinson *v.* Henderson (2 Mylne & King, 582) was a case of partnership where a deceased partner's estate was held liable immediately for the firm debts, without averment of insolvency of the surviving partners; and the court, after pointing out that either the creditor must be required to exhaust his remedies against the survivors, or that the executors of the deceased must be required to demand the balance on settlement of the firm accounts, concluded that the latter is the sound rule. Such is also the doctrine of Nelson *v.* Hill, (5 Howard, 127,) and that asserted in Story on Partnership, 362, note 3.

And the rule is not different in bankruptcy. Creditors of a firm have been allowed in some cases to prove their claims against the separate estate of a bankrupt partner. Whether such creditors are permitted to share ratably with the separate creditors, or only to come upon that portion of the estate which remains after the separate creditors are paid, is immaterial to the present question. It is sufficient that they are allowed to prove their claims. The bankruptcy court acknowledges them to be creditors of the bankrupt partner, though in

marshalling the assets it may give priority to the separate creditors.

The case then, as prescribed, is this: The seven partners of the firm of Jay Cooke, McCulloch & Co., who are resident in the United States, and who were also partners in the firm of Jay Cooke & Co., are severally, as well as jointly with others, indebted to the United States, and they are insolvent. The defendant, Lewis, has in his hands a large amount of money and other property which was the separate estate of these debtors, which he holds in trust for the payment of these debts. Why, then, is not the exact case before us which was contemplated by the act of Congress, which gives to the United States priority of right over the claims of other creditors? The statute gives that priority without exception. It attaches to all debts due to the United States, whether they be joint or several; whether they be legal or equitable. It postpones all debts due to others, no matter what their character may be. True, the priority of the United States does not override any liens upon the debtor's property which existed before the event occurred which gives the statutory priority, that is, before the insolvency. (Conrad *v.* The Ins. Co., 1 Peters, 439; Brent *v.* The Bank, 10 Peters, 596.) The reason for this is obvious. The claim of the Government extends only to that which was the property of the debtor when he became insolvent, and his property is only that, in substance, which remains after the satisfaction of liens upon it. His power of disposition extends no farther. The lien is paramount to his right. But there are no liens in this case to interfere with the priority of the United States. None are asserted. The proceeding in bankruptcy transferred the estate of the

debtors to the trustee, just as it was when the act of bankruptcy was committed. Conceding that it created a trust in favor of the creditors, it is a trust for the payment of debts, and the trustee holds as well for the United States as for the other creditors. It creates no vested interests in the other creditors superior to those of the Government. On the contrary, under the statute, the trust in favor of the latter must be paramount. In Beaston *v.* The Farmers' Bank of Delaware, 12 Peters, 102, it was decided to be the operation of the act of 1797, that whenever the debtor is divested of his property, in one of the modes stated in the act, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay the United States first out of the proceeds of the debtor's property. And the bankrupt act has wrought no difference. It has not repealed the act of 1797, and the United States are not subject to its provisions. (U. S. *v.* Herron, 20 Wallace, 251.) Certainly, the bankrupt act has given to the creditors of a bankrupt no lien on the assigned property which can interfere with debts due to the United States. The right to priority of payment is a legal right, not a merely equitable one. It is called into existence by the bankruptcy of the debtors, but it is not created by the bankrupt act. If, then, there is no lien upon the property in the hands of the trustee, no lien held by or for the other creditors of the individual partners of Jay Cooke, McCulloch & Co., who are bankrupts, why must not the debt due to the United States be first paid?

This question leads to a consideration of the defences set up in the defendant's answer. They are all equitable, and, in our judgment, most of them are quite immaterial, needing no discussion. That there are other

creditors of one or more of the debtors whose estate is in the trustee's hands; that the bill does not aver the insolvency of Jay Cooke, McCulloch & Co.; that it does not state the balances due to the firm by the partners respectively, nor aver any demand on the three solvent partners, or inability on their part to pay the debt due the United States; or that the claim of the United States has not been proved under the bankrupt law; none or all of these things can possibly affect the right now claimed by the plaintiffs, and they have not been urged in the argument. The defence is rested mainly upon the equity rule that in marshalling the assets of a firm, and those of the members of the firm, in case of insolvency, partnership creditors are entitled to the joint property to the exclusion of separate creditors of the partners, and separate creditors are entitled to the separate property in preference to creditors of the partnership. It is said the United States is a joint creditor, and, therefore, that the private estates of the separate creditors of the several partners, now in the hands of the trustee, must, under the rule, be applied first to the payment of the individual debts of the partners respectively. The existence of the rule in equity, as well as in bankruptcy, may be conceded; but, for several reasons, it is inapplicable to such a case as we have before us. It was introduced at first and it is continued professedly to promote equality of distribution. But the statute giving priority to the United States is intended to prevent such equality. How, then, can an equity rule designed to secure equality, prevail against a statute, the purpose of which is to destroy it? How can a claim preferred by an act of Congress absolutely, without exception or qualification, be postponed to the

claims of other creditors by force of an equitable maxim never intended to be applicable to the case of a claimant who has a superior right by law? If, therefore, this were a case in which the United States could be regarded as a joint creditor of the bankrupt partners claiming against the separate creditors of those partners, no court would be at liberty to deny effect to the statute. But the facts exhibited do not present such a condition of things as to enable the defendant to invoke the application of the rule, independently of the statutes. The rule is applicable only where the joint estate as well as the private estates of the insolvent partner is before the court for distribution, and where there are joint creditors and also separate creditors of the individual partners. Here the two funds before the court are the joint property of Jay Cooke & Co., and the separate property of the members of the firm. Over the property of Jay Cooke, McCulloch & Co. the court has no control. The United States are not creditors of Jay Cooke & Co. They have no claim upon the joint fund within the power of the court, and they cannot be remitted to it. All they can reach of that is, the individual shares of the partners in what may remain after the payment of the joint debts of that firm, if anything shall remain. If they cannot reach the private property, they can obtain nothing. If they were creditors of Jay Cooke & Co., the rule in equity might be invoked were it not for the act of Congress; and so also, if the property to be marshalled were the joint property of the London firm, and the private property of the partners. But under the facts of the case, and in view of the unqualified provisions of the statute, we think the equity rule relied upon by the defendant has no applicability to it. Entertaining this

opinion, it is unnecessary to discuss this ground of defence more at length.

That the United States are not under obligation to make use of the collaterals, and apply the proceeds thereof to the satisfaction or reduction of the debt claimed before asserting a right to the fund in the trustee's hands, is very plain. That might be their duty if they were bound by the bankrupt law; but, as we have seen, they are not. They would not be even if they had proved their debt. (Harrison *v.* Sterry, 5 Cranch, 298.) And independent of the provisions of the bankrupt act, no creditor can be compelled to make use of the collaterals he may hold as a security for the debt due him before resorting directly to his debtor. This assertion is abundantly sustained by authority. The answer to the cross-bill avers that the collaterals were pledged for another debt. This, indeed, is not an admitted or established fact; but if it is a fact, clearly the trustee has no right to insist on a resort to the collaterals. And if it be not a fact, the utmost right he has is to subrogation after the debt is paid. Even a surety cannot compel the creditor to resort in the first instance to the estate of his principal. He has no right in equity until he has himself performed equity by paying the debt. The bankrupt partners in this case are not even sureties. They are principal debtors. What a surety cannot do, is certainly beyond their power, and if they cannot require the United States to sell the collaterals before payment of the debts, or to resort primarily to their co-debtors, the solvent partners of Jay Cooke, McCulloch & Co., surely their trustee cannot.

There is, then, nothing in any principle of equity or rule in bankruptcy that affects the right of the United

States to priority of payment of the debt due them out of the private estates of the bankrupts in the hands of the trustee, and a decree will be made accordingly.

Let a decree be prepared declaring that the United States are entitled to be paid out of the property in the hands of the trustee, belonging to the private estates of those partners of the firm of Jay Cooke, McCulloch & Co., who have been adjudicated bankrupts, the amount due by the said firm to the plaintiffs on the day the petition in bankruptcy was filed, in preference to other creditors, and declaring also that the United States are not required to exhaust their rights in the securities pledged to them before they are thus entitled.

And the right of the plaintiffs to apply for further relief in accordance with the prayer of their bill without prejudice by reason of this decree is reserved.

And all questions respecting the right of the defendant to subrogation hereafter, and respecting the administration of the securities in the hands of the United States, as also the right to an account, are likewise reserved for future adjudication.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original opinion of the court in the suit of the United States *vs.* Edwin M. Lewis et al., No. 7, April session 1875, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my

name and affixed the seal of the said court at Philadelphia, this 17th day of January, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundredth.

[SEAL.] SAMUEL BELL,
Clerk of Circuit Court.

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